V. KISHAN RAO

v.

NIKHIL SUPER SPECIALITY HOSPITAL & ANOTHER.

(Civil Appeal No. 2641 of 2010)

MARCH 8, 2010*

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Consumer Protection Act, 1986:

Medical Negligence – Expert Evidence – Requirement of – Held: Expert evidence is not required in all medical negligence cases – Expert evidence is necessary when Fora comes to the conclusion that case is complicated or such that it cannot be resolved without assistance of expert opinion – Fora cannot follow mechanical or strait jacket approach – Each case has to be judged on its own facts – Negligence.

s. 2(1)(g) – Medical Negligence/Deficiency in service – Patient suffering intermittent fever with chill admitted to hospital – Condition worsened critically and shifted to other hospital, where patient was declared dead – Complaint by husband before District Forum alleging deficiency in service – Award of two lakhs compensation – Set aside by State Commission as also National commission holding that there was no expert evidence to prove negligence – On appeal, held: It was a case of wrong treatment – Test conducted by other hospital for malaria found positive – Widel test for typhoid found negative – Patient treated for typhoid and not malaria by hospital where patient admitted when complaint was of intermittent fever with chill – As a result condition of patient deteriorated and became very critical and was removed to other hospital where she could not be revived – She had no pulse, no BP and in an unconscious state with pupils dilated and had to be put on a ventilator – Thus, expert

*. Judgment Recd. ON. 4.5.2010.

evidence was not necessary to prove medical negligence.

Negligence:

Medical negligence – Doctrine of res ipsa loquitur – Applicability of – In medical negligence cases – Held: Doctrine is applicable where negligence is evident – Complainant does not have to prove anything as the thing (res) proves itself – Respondent has to prove that he has taken care and done his duty to repel the charge of negligence – Doctrines – Torts.

Medical Negligence – Requirement of expert evidence in medical negligence cases – Directions in D'souza's case to have expert evidence in all cases of medical negligence whether binding – Held: Directions rendered in D'souza's case ignoring the provisions of the governing statute and earlier larger Bench decision on the point – Thus, not a binding precedent in cases of medical negligence before consumer Fora – Precedent.

Medical negligence – Bolam test – Held: Lays down the standards for judging cases of medical negligence.

Evidence Act, 1872: ss. 61, 64, 74 and 75 – Complaint before consumer forum alleging medical negligence – Opposite party alleging that hospital records proved without following the provisions of the Evidence Act – Held: Provisions of the Evidence Act are not applicable – Complaints before consumer forum are to be tried summarily.

Judgment/Order: 'Per incuriam' – When judgment rendered 'per incuriam' – Held: When a judgment is passed ignoring the provisions of the governing statute and earlier larger Bench decision on the point, it is rendered 'per incuriam'.

The appellant's wife was suffering from intermittent fever with chill and was admitted in the respondent no. 1

hospital. She underwent certain tests but the tests did not reveal malaria. The patient did not respond to the medicines administered to her and her condition deteriorated day by day. She was finally shifted to Y hospital in a very precarious condition and was virtually clinically dead. The Y hospital issued a death certificate which disclosed that the patient died due to cardio respiratory arrest and malaria. The appellant filed a complaint against the respondent no. 1 hospital before the District Forum alleging negligence in treating his wife. The doctor R of the respondent no. 1 hospital deposed that the appellant's wife was not treated for malaria. The District Forum held that the patient was suffering from malaria but was treated for typhoid and as such was subjected to the wrong treatment, and awarded compensation of Rs. 2 lakhs. The respondent no. 1 filed an appeal. The State Consumer Disputes Redressal Commission allowed the appeal holding that there was no expert opinion to substantiate the allegation of negligence. The National Consumer Disputes Redressal Commission upheld the order of the State Consumer Forum. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The general direction in **Martin F. D'souza v. Mohd. Ishfaq's* **case to have expert evidence in all cases of medical negligence is not binding. In the facts and circumstances of the case, expert evidence is not required and District Forum rightly did not ask the appellant to adduce expert evidence. Both State Commission and the National Commission fell into an error by opining to the contrary. The orders passed by the State Commission and the National Commission are set aside and the order passed by the District Forum is restored. The respondent no.1 is directed to pay the appellant the amount granted in his favour by the District Forum. [Para 55] [33-F-H; 34-A]**

2.1. The complaints before consumer forums are tried summarily and the Evidence Act, 1872 in terms does not apply. The District Forum rightly overruled the objection on behalf of the respondent no.1 before the District Forum that the complaint sought to prove Y Hospital's record without following the provisions of ss. 61, 64, 74 and 75 of the Evidence Act. [Para 8] [14-G-H; 15-A-B]

Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and others **(2009) 9 SCC 221, relied on.**

2.2. Before forming an opinion that expert evidence is necess*ary,* *the Fora under the Act must come to a conclusion t*hat **the case is complicated eno*u*gh to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. In these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will be unnecessarily burdened and in many cases such remedy would be illusory. [Para 13] [16-C-F]**

2.3. As regard the requirement of expert evidence, before the Fora under the Act both simple and complicated cases may come. In complicated cases which require recording of evidence of expert, the complainant may be asked to approach the civil court for appropriate relief. Section 3 of the Consumer Protection Act provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Thus, the Act preserves the right of the consumer to approach the civil court in complicated cases of medical negligence for necessary relief. Cases in which complicated questions

do not arise the Forum can give redressal to an aggrieved consumer on the basis of a summary trial on affidavits. [Para 32] [23-F-H; 24-A]

***Indian Medical Association vs. V.P. Shantha & others* (1995) 6 SCC 651, relied on.**

2.4. Before the consumer Fora if any of the parties wants to *adduce expert evidence, the members of the Fora by applying* **their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of Fora especially when retired judges of Supreme Court and High Court are appointed to head National Commission and the State Commission respectively. Therefore, these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence. When the Fora finds that expert evidence is required, the Fora must keep in mind that an expert witness in a given case normally discharges two functions. The first duty of the expert is to explain the technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Fora in deciding whether the acts or omissions of the medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases the question whether a medical practitioner or the hospital is negligent or not is a mixed question of fact and law and the Fora is not bound in every case to accept the opinion of the expert witness. Although, in many cases the opinion of the expert witness may assist the Fora to decide the controversy one way or the other. [Para 54] [33-A-F]**

2.5. The instant case is a case of wrong treatment in as much as the patient was not treated for malaria when the complaint is of intermittent fever and chill. Instead the respondent No.1 treated the patient for Typhoid and as a result of which the condition of the patient deteriorated. When the condition became very critical the patient was removed to Y Hospital but patient could not be revived. RW-1-doctor R admitted in his evidence that the patient was not treated for malaria. The evidence shows that of the several injections given to the patient, only one was of Lariago. Apart from Lariago, several other injections were also administered on the patient. Lariago may be one injection for treating malaria but the finding of Y Hospital shows that smear for malarial parasite was positive. There is thus a definite indication of malaria, but so far as Widal test was conducted for Typhoid it was found negative. Even in such a situation the patient was treated for Typhoid and not for malaria and when the condition of the patient worsened critically, she was sent to Y Hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated, as a result of which the patient had to be put on a ventilator. Thus, the expert evidence was not necessary to prove medical negligence. [Paras 14 and 15] [16-F-H; 17-A-B]

3. The parameters set down in Bolam test are to be reconsidered as a guide to decide cases on medical negligence and specially in view of Article 21 of the Constitution which encompasses within its guarantee, a right to medical treatment and medical care. In England, Bolam test is now considered merely a 'rule of practice or of evidence. It is not a rule of law.' However, Bolam test correctly lays down the standards for judging cases of medical negligence, and there is no departure from the same. [Para 21] [19-C-E]

***Jacob Mathew vs. State of Punjab and another* **(2005) 6 SCC 1, relied on.**

Bolam vs. Friern Hospital Management Committee **1957 (2) All England Law Reports 118 – referred to.**

Medical Negligence by Michael Jones Sweet & Ma*xwell,* ***Fourth Edition 2008, paragraph 3-039 pg 24*****6; Professional Negligence by Jackson & Powell Sweet** ***&*** *Maxwell, Fifth Edition,* ***2002 para*****graph 7-047 pg 200; Clinical Negligence by Michael Powers QC**, *Nigel Harris and Anthony Barton, 4th Edition*, **Tottel Publishing paragraph 1.60, referred to.**

4.1 When a *judgment is rendered by ignoring the provisions of the governing statute a*nd earlier larger Bench decision on the point such decisions are rendered 'Per incuriam'. [Para 51] [32-A]

A.R. Antulay vs. R.S. Nayak and Anr. **(1988) 2 SCC 602;** *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh vs. Presiding Officer, Labour Court, Chandigarh and Ors.* **(1990) 3 SCC 682, r*eferred to.***

4.2. *In **Jacob Mathew vs. State of Punjab's* case, *the direction by the three-judge bench for consulting the opini*on of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. Subsequently, the directions in D'souza's case to have expert evidence in all cases of medical negligence are not consistent with the law laid down by the larger Bench in Mathew's case. The reason why the larger Bench in Mathew's case did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. Those directions in D'souza's case are also inconsistent with the principles laid down in another three-Judge Bench of this Court in ***Indian

Medical Association vs. V.P. Shantha's case wherein it was held that the definition of 'service' u/s.2(1)(o) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner. In *D'souza's* case, the earlier larger Bench decision in ****Dr. J. J. Merchant vs. Shrinath Chaturvedi has not been noticed. [Paras 29, 30, 31 and 37] [23-A-E; 26-B]

4.3. The directions in paragraph 106 in D'souza's case is contrary to the provisions of the Consumer Protection Act, the Rules which is the governing statute and also to the avowed purposes of the Act. The Act was brought about in the background of worldwide movement for consumer protection. It is clear from the statement of objects and reasons of the Act that it is to provide a forum for speedy and simple redressal of consumer disputes. Such avowed legislative purpose cannot be either defeated or diluted by superimposing a requirement of having expert evidence in all cases of medical negligence regardless of factual requirement of the case. If that is done the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man. [Paras 38, 39 and 42] [26-B-D; 42-A-C]

State of Karnataka v. Vishwabharathi House Building Coop. Society & Others **(2003) 2 SCC 412;** *Lucknow Development Authority v. M.K. Gupta* **(1994) 1 S*CC 243;*** *Charan Singh v. Healing Touch Hospital* **(2000) 7 SCC *668;*** *Spring Me*adows Hospital v. *Harjol Ahluwalia* **(1998) 4 SCC 39;** *India Photographic Co. Ltd. v. H.D. Shourie* **(1999) 6 SCC 428, referred to.**

4.4. *In a case where negligence is evident, the princi*ple of res ipsa *loquitur operates and the complainant does no*t have to prove anything as the thing (res) proves itself. In such a case it is for the respon*dent to prove th*at

he has taken care and done his duty to repel the charge of negligence. If *the* general directions in paragraph 106 in *D'souza* are to be followed then the doctrine of res ipsa loquitur which is applied in cases of medical negligence by this Court and also by Courts in England would be redundant. [Paras 47 and 48] [31-A-C]

Spring Meadows Hospital v. Harjol Ahluwalia **(1998) 4 SCC 39;** *Postgraduate Institute of Medial Education and Research, Chandigarh v. Jaspal Singh and others* **(2009) 7 SCC 330, referred to.**

Scott v. London & St. Katherine Docks Co. **(1865) 3 H & C. 596, referred to.**

4.5. *The two-Judge Bench in D'souza*'s case has taken note of the dec*isions in Indian Medical Association's case* and Mathew's case, but even after taking note of those two decisions, D'souza's case gave those general directions in paragraph 106 which are contrary to the principles laid down in both those larger Bench decisions. The larger Bench decision in Dr. J.J. Merchant's case has not been noted in D'souza's case. Apart from that, the directions in paragraph 106 in D'souza's case are contrary to the provisions of the governing statute and also inconsistent with the avowed purpose of the Act. Thus, the general direction given in paragraph 106 in D'souza's case cannot be accepted as constituting a binding precedent in cases of medical negligence before consumer Fora and those directions must be confined to the particular facts of that case. [Paras 53 and 49] [31-C-D; 32-E-G]

Martin F. D'souza v. Mohd. Ishfaq* **2009 (3) SCC 1, held per incuriam.

***Jacob Mathew vs. State of Punjab and another* **(2005) 6 SCC 1;** ****Indian Medical Association vs. V.P. Shantha & others* **(1995) 6 SCC 651;** *****Dr. J. J. Merchant and others vs. Shrinath Chaturvedi* **(2002) 6 SCC 635, relied on.**

Tarun Thakore vs. Dr. Noshir M. Shroff **O.P. No. 215/2000 date*d* 24.9.2002, referred to.**

R. vs. Lawrence **(1981) 1 All ER 974;** *Andrews v. Director of Public Prosecutions,* **(1937) 2 All ER 552 (HL);** *Riddell vs. Reid* **(1943) AC 1 (HL), referred to.**

Case Law Reference:

(2009) 9 SCC 221	Relied on.	Paras 8, 29,
1957 (2) All ER 118	Referred to.	Paras 16, 17, 18, 19, 21
(2005) 6 SCC 1	Relied on.	Paras 21, 27, 29, 30, 53
(1981) 1 All ER 974	Referred to.	Para 23
(1937) 2 All ER 552(HL)	Referred to.	Para 23
(1943) AC 1 (HL)	Referred to.	Para 25
(1995) 6 SCC 651	Relied on.	Paras 32, 33, 34
(2002) 6 SCC 635	Relied on.	Paras 36, 37, 53
(2003) 2 SCC 412	Referred to.	Para 40
(1994) 1 SCC 243	Referred to.	Para 41
(2000) 7 SCC 668	Referred to.	Para 41
(1998) 4 SCC 39	Referred to.	Para 41, 43
(1999) 6 SCC 428	Referred to.	Para 41
(2009) 7 SCC 330	Referred to.	Para 44
(1865) 3 H & C. 596	Referred to.	Para 45
2009 (3) SCC 1	Held per incuriam	Para 49, 50, 53, 55

(1988) 2 SCC 602 Referred to. Para 51

(1990) 3 SCC 682 Referred to. Para 52

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2641 of 2010.

From the Judgment & Order dated 19.2.2009 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 303 of 2009.

N.S. Gahlot, R.K. Singh, Sanjeev Malhotra for the Appellant.

K. Maruthi Rao for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal has been filed challenging the judgment and order dated 19.02.2009 of the National Consumer Disputes Redressal Commission, New Delhi (hereinafter, 'National Commission') which upheld the finding of the State Consumer Forum. The order of the National Commission runs as follows:

> "Heard. The State Commission after elaborate discussion has come to the conclusion that there was no negligence on the part of the respondent doctor. All possible care was taken by the respondent in treating the petitioner. The State Commission has also recorded a finding that no expert opinion was produced by the petitioner to prove that the line of treatment adopted by the respondent hospital was wrong or was due to negligence of respondent doctor. Dismissed".

3. The appellant, who happens to be the original complainant, is an officer in the Malaria department and he got his wife admitted in the Respondent No. 1 hospital on 20.07.02 as his wife was suffering from fever which was intermittent in nature and was complaining of chill.

4. In the complaint, the appellant further alleged that his wife was subjected to certain tests by the respondent No.1 but the test did not show that she was suffering from malaria. It was also alleged that his wife was not responding to the medicine given by the opposite party No.1 and on 22nd July, 2002 while she was kept admitted by respondent No.1, saline was given to her and the complainant had seen some particles in the saline bottle. This was brought to the notice of the authorities of the respondent No.1 but to no effect. Then on 23rd July 2002 complainant's wife was complaining of respiratory trouble and the complainant also brought it to the notice of the authorities of the respondent No.1 who gave artificial oxygen to the patient. According to the complainant at that stage artificial oxygen was not necessary but without ascertaining the actual necessity of the patient, the same was given. According to the complainant his wife was not responding to the medicines and thus her condition was deteriorating day by day. The patient was finally shifted to Yashoda Hospital from the respondent No.1.

5. At the time of admission in Yashoda Hospital the following conditions were noticed:

"<u>INVESTIGATIONS</u>

Smear for MP-Positive-ring forms & Gametocytes of P. Falciparam seen Positive index-2-3/100RBCS

LFT-TB-1.5
DB-1.0
IB-0.5

WIDAL test-Negative
HIV & HBsAG-Negative
PT-TEST-22 sec
CONTROL-13 sec
APTT-TEST-92 sec

CONTROL-38 sec
CBP-HB-3.8% gms
TLC-30.900/cumm
RBC-1.2/cumm
HRP II-Positive
B urea-38 mg/dl
S Creatinine-1.3 mb/dl
S Electrolytes-NA/K/CL-148/5.2/103 mEq/L
C X R – s/o ARDS

CASE DISCUSSION

45 yrs old of patient admitted in AMC with H/o fever-8 days admitted 5 days back in NIKHIL HOSPITAL & given INJ MONOCEF, INJ CIFRAN, INJ CHOLROQUINE because of dysnoea today suddenly shifted to Y.S.S.H. for further management. Upon arrival in AMC, patient unconscious, no pulse, no BP, pupils dilated. Immediately patient intubated & ambu bagging AMC & connected to ventilator. Inj. Atropine, inj. Adhenoline, inj. Sodabicarb given, DC shock also given. Rhyth restored at 1.35 PM At 10.45 pm, patient developed brady cardia & inspite of repeated Altropine & Adhenolin. HR-'O' DC shock given. External Cardiac massage given. In spite of all the resuscitative measure patient could not be revived & declared dead at 11.30pm on 24.7.2002".

6. In the affidavit, which was filed by one Dr. Venkateswar Rao who is a Medical Practitioner and the Managing Director of the respondent No.1 before the District Forum, it was admitted that patient was removed from respondent No.1 to the Yashoda Hospital being accompanied by the doctor of the respondent No.1. From the particulars noted at the time of admission of the patient in Yashoda Hospital it is clear that the patient was sent to Yashoda Hospital in a very precarious condition and was virtually, clinically dead.

7. On the complaint of the appellant that his wife was not

given proper treatment and the respondent No.1 was negligent in treating the patient the District Forum, on a detailed examination of the facts, came to a finding that there was negligence on the part of the respondent No.1 and as such the District Forum ordered that the complainant is entitled for refund of Rs.10,000/- and compensation of Rs.2 lakhs and also entitled to costs of Rs.2,000/-.

8. The District Forum relied on the evidence of Dr. Venkateswar Rao who was examined on behalf of the respondent No.1. Dr. Rao categorically deposed "I have not treated the case for malaria fever". The District Forum found that the same is a clear admission on the part of the respondent No.1 that the patient was not treated for malaria. But the death certificate given by the Yashoda Hospital disclosed that the patient died due to "cardio respiratory arrest and malaria". In view of the aforesaid finding the District Forum came to the conclusion that the patient was subjected to wrong treatment and awarded compensation of Rs.2 lakhs and other directions as mentioned above in favour of the appellant. The District Forum also noted when the patient was admitted in a very critical condition in Yoshoda Hospital and the copy of the Haematology report dated 24.7.2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. The District Forum also noted that the case sheet also does not show that any treatment was given for Malaria. The Forum also noted that the respondent-authorities, despite the order of the Forum to file the case sheet, delayed its filing and there were over writings on the case sheet. Under these circumstances the District Forum noted that case records go to show that wrong treatment for Typhoid was given to the complainant's wife. As a result of such treatment the condition of the complainant's wife became serious and in a very precarious condition she was shifted to Yashoda Hospital where the record shows that the patient suffered from malaria but was not treated for malaria. Before the District Forum, on behalf of the respondent No.1, it was argued that the complaint sought to prove Yashoda

Hospital record without following the provisions of Sections 61, 64, 74 and 75 of Evidence Act. The Forum overruled the objection, and in our view rightly, that complaints before consumer are tried summarily and Evidence Act in terms does not apply. This Court held in the case of *Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and others* reported in (2009) 9 SCC 221 that provisions of Evidence Act are not applicable and the Fora under the Act are to follow principles of natural justice (See paragraph 43, page 252 of the report).

9. Aggrieved by the order of the District Forum respondent No. 1 preferred an appeal to the State Consumer Disputes Redressal Commission (FA No. 89 of 2005) and the insurance company, which is respondent no. 2 before this Court, preferred another appeal (FA no. 1066 of 2005). The State Forum vide its order dated 31.10.2008 allowed the appeals.

10. In doing so the State Commission relied on a decision in *Tarun Thakore vs. Dr. Noshir M. Shroff* (O.P. No. 215/2000 dated 24.9.2002) wherein the National Commission made some observations about the duties of doctor towards his patient. From those observations it is clear that one of the duties of the doctor towards his patient is a duty of care in deciding what treatment is to be given and also a duty to take care in the administration of the treatment. A breach of any of those duties may lead to an action for negligence by the patient. The State Forum also relied on a decision of this Court in *Indian Medical Association vs. V.P. Shantha & others* – (1995) 6 SCC 651.

11. Relying on the aforesaid two decisions, the State Forum found that in the facts and circumstances of the case, the complainant failed to establish any negligence on the part of the hospital authorities and the findings of the District Forum were overturned by the State Commission. In the order of the State Commission there is a casual reference to the effect that "there is also no expert opinion to state that the line of treatment

adopted by the appellant/opposite party No.1 Hospital is wrong or is negligent".

12. In this case the State Forum has not held that complicated issues relating to medical treatment have been raised. It is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria when the complaint is of intermittent fever and chill. Instead the respondent No.1 treated the patient for Typhoid and as a result of which the condition of the patient deteriorated. When the condition became very very critical the patient was removed to Yashoda Hospital but patient could not be revived.

13. In the opinion of this Court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will be unnecessarily burdened and in many cases such remedy would be illusory.

14. In the instant case, RW-1 has admitted in his evidence that the patient was not treated for malaria. Of course evidence shows that of the several injections given to the patient, only one was of Lariago. Apart from Lariago, several other injections were also administered on the patient. Lariago may be one injection for treating malaria but the finding of Yashoda Hospital which has been extracted above shows that smear for malarial parasite was positive. There is thus a definite indication of malaria, but so far as Widal test was conducted for Typhoid it

was found negative. Even in such a situation the patient was treated for Typhoid and not for malaria and when the condition of the patient worsened critically, she was sent to Yashoda Hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated. As a result of which the patient had to be put on a ventilator.

15. We do not think that in this case, expert evidence was necessary to prove medical negligence.

16. The test of medical negligence which was laid down in *Bolam vs. Friern Hospital Management Committee* reported in 1957 (2) All England Law Reports 118, has been accepted by this Court as laying down correct tests in cases of medical negligence.

17. Bolam was suffering from mental illness of the depressive type and was advised by the Doctor attached to the defendants' Hospital to undergo electro-convulsive therapy. Prior to the treatment Bolam signed a form of consent to the treatment but was not warned of the risk of fracture involved. Even though the risk was very small and on the first occasion when the treatment was given Bolam did not sustain any fracture but when the treatment was repeated for the second time he sustained fractures. No relaxant drugs or manual control were used except that a male nurse stood on each side of the treatment couch throughout the treatment. About this treatment there were two bodies of opinion, one of which favoured the use of relaxant drugs or manual control as a general practice, and the other opinion was for the use of drug that was attended by mortality risks and confined the use of relaxant drugs only to cases where there are particular reasons for their use and Bolam case was not under that category. On these facts the expert opinion of Dr. J.de Bastarrechea, consultant psychiatrist attached to the Hospital was taken. Ultimately the Court held the Doctors were not negligent. In this context the following principles have been laid down:

"A Doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"…(See page 122 placitum 'B' of the report)

18. It is also held that in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a doctor is not negligent merely because his conclusion differs from that of other professional men. It was also made clear that the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care (See page 122, placitum 'A' of the report).

19. Even though Bolam test was accepted by this Court as providing the standard norms in cases of medical negligence, in the country of its origin, it is questioned on various grounds. It has been found that the inherent danger in Bolam test is that if the Courts defer too readily to expert evidence medical standards would obviously decline. Michael Jones in his treaties on *Medical Negligence (Sweet & Maxwell), Fourth Edition, 2008* criticized the Bolam test as it opts for the lowest common denominator. The learned author noted that opinion was gaining ground in England that Bolam test should be restricted to those cases where an adverse result follows a course of treatment which has been intentional and has been shown to benefit other patients previously. This should not be extended to certain types of medical accident merely on the basis of how common they are. It is felt "to do this would set us on the slippery slope of excusing carelessness when it happens often enough" (See *Michael Jones* on *Medical Negligence* paragraph 3-039 at page 246).

20. With the coming into effect of Human Rights Act, 1998 from 2nd October, 2000 in England, the State's obligations under the European Convention on Human Rights (ECHR) are justiciable in the domestic courts of England. Article 2 of the

Human Rights Act 1998 reads as under:-

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

21. Even though Bolam test 'has not been uprooted' it has come under some criticism as has been noted in *Jackson & Powell* on *Professional Negligence (Sweet & Maxwell*)*, Fifth Edition, 2002*. The learned authors have noted (See paragraph 7-047 at page 200 in Jackson & Powell) that there is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. In the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in Bolam test as a guide to decide cases on medical negligence and specially in view of Article 21 of our Constitution which encompasses within its guarantee, a right to medical treatment and medical care. In England, Bolam test is now considered merely a 'rule of practice or of evidence. It is not a rule of law' (See paragraph 1.60 in *Clinical Negligence* by *Michael Powers QC, Nigel Harris and Anthony Barton, 4th Edition, Tottel Publishing)*. However as in the larger Bench of this Court in *Jacob Mathew vs. State of Punjab and another* – (2005) 6 SCC 1, Chief Justice Lahoti has accepted Bolam test as correctly laying down the standards for judging cases of medical negligence, we follow the same and refuse to depart from it.

22. The question of medical negligence came up before this Court in a decision in *Mathew* (supra), in the context of Section 304-A of Indian Penal Code.

23. Chief Justice Lahoti, speaking for the unanimous three-Judge Bench in *Mathew* (supra), made a clear distinction

between degree of negligence in criminal law and civil law where normally liability for damages is fastened. His Lordship held that to constitute negligence in criminal law the essential ingredient of '*mens rea'* cannot be excluded and in doing so, His Lordship relied on the speech of Lord Diplock in *R. vs. Lawrence,* [(1981) 1 All ER 974]. The learned Chief Justice further opined that in order to pronounce on criminal negligence it has to be established that the rashness was of such a degree as to amount to taking a hazard in which injury was most likely imminent. The neat formulation by Lord Atkin in *Andrews v. Director of Public Prosecutions,* [(1937) 2 All ER 552 (HL) at page 556] wherein the learned Law Lord delineated the concept of negligence in civil and criminal law differently was accepted by this Court.

24. Lord Atkin explained the shades of distinction between the two very elegantly and which is excerpted below:-

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

25. Chief Justice Lahoti also relied on the speech of Lord Porter in *Riddell vs. Reid* [(1943) AC 1 (HL)] to further identify the difference between the two concepts and which I quote:-

> "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability."
>
> [This has been quoted in the treatise on Negligence by Charlesworth and Percy (para 1.13)]

26. In the concluding part of the judgment in *Mathew* (supra) in paragraph 48, sub-paras (5) and (6) the learned Chief Justice summed up as follows:-

"(*5*) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(*6*) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly"."

27. After laying down the law, as above, the learned Chief Justice opined that in cases of criminal negligence where a private complaint of negligence against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. Hon'ble Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard. Till that is done, the aforesaid course should be followed. But those directions in paragraph 52 of *Mathew* (supra) were certainly not given in respect of complaints filed before the Consumer Fora under the said Act where medical negligence is treated as civil liability for payment of damages.

28. This fundamental distinction pointed out by the learned Chief Justice in the unanimous three-Judge Bench decision in *Mathew* (supra) was unfortunately not followed in the subsequent two-Judge Bench of this Court in *Martin F. D'souza v. Mohd. Ishfaq,* reported in 2009 (3) SCC 1. From the facts noted in paragraphs 17 and 18 of the judgment in *D'souza* (supra), it is clear that in *D'souza* (supra) complaint was filed before the National Consumer Disputes Redressal Commission and no criminal complaint was filed. The Bench in *D'souza* (supra) noted the previous three-Judge Bench judgment in *Mathew* (supra) [paragraph 41 at pages 17-18 of the report] but in paragraph 106 of its judgment, *D'souza* (supra) equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the Consumer Fora and gave the following directions covering cases before both. Those directions are set out below:-

"We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew case*, otherwise the policemen will themselves have to face legal action."

29. We are of the view that aforesaid directions are not consistent with the law laid down by the larger Bench in *Mathew*

(supra). In *Mathew* (supra), the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in *Mathew* (supra) did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. This has been elaborately discussed in *Mathew* (supra). This distinction has been accepted in the judgment of this Court in *Malay Kumar Ganguly* (supra) (See paras 133 and 180 at pages 274 and 284 of the report).

30. Therefore, the general directions in paragraph 106 in *D'souza* (supra), quoted above are, with great respect, inconsistent with the directions given in paragraph 52 in *Mathew* (supra) which is a larger Bench decision.

31. Those directions in *D'souza* (supra) are also inconsistent with the principles laid down in another three-Judge Bench of this Court rendered in *Indian Medical Association* (supra) wherein a three-Judge Bench of this Court, on an exhaustive analysis of the various provisions of the Act, held that the definition of 'service' under Section 2(1)(o) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner.

32. About the requirement of expert evidence, this Court made it clear in *Indian Medical Association* (supra) that before the Fora under the Act both simple and complicated cases may come. In complicated cases which require recording of evidence of expert, the complainant may be asked to approach the civil court for appropriate relief. This Court opined that Section 3 of the Act provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Thus the Act preserves the right of the consumer to approach the civil court in complicated cases of medical negligence for necessary relief. But this Court held that cases in which complicated questions

do not arise the Forum can give redressal to an aggrieved consumer on the basis of a summary trial on affidavits. The relevant observations of this Court are:

> "...There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning [as in *Chin Keow* v. *Govt. of Malaysia*, 1967 (1) WLR 813(PC)] or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief..."

33. A careful reading of the aforesaid principles laid down by this Court in *Indian Medical Association* (supra) makes the following position clear:-

(a) There may be simple cases of medical negligence where expert evidence is not required.

(b) Those cases should be decided by the Fora under the

said Act on the basis of the procedure which has been prescribed under the said Act.

(c) In complicated cases where expert evidence is required the parties have a right to go to the Civil Court.

(d) That right of the parties to go to Civil Court is preserved under Section 3 of the Act.

34. The decision in *Indian Medical Association* (supra) has been further explained and reiterated in another three judge Bench decision in *Dr. J. J. Merchant and others vs. Shrinath Chaturvedi* reported in (2002) 6 SCC 635.

35. The three Judge Bench in *Dr. J. J. Merchant* (supra) accepted the position that it has to be left to the discretion of Commission *"to examine experts if required in an appropriate matter.* It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. The only caution required is to follow the said procedure strictly." [para 19, page 645 of the report]

[Emphasis supplied]

36. It is, therefore, clear that the larger Bench in *Dr. J. J. Merchant* (supra) held that only in appropriate cases examination of expert may be made and the matter is left to the discretion of Commission. Therefore, the general direction given in para 106 in *D'Souza* (Supra) to have expert evidence in all cases of medical negligence is not consistent with the principle laid down by the larger bench in paragraph 19 in *Dr. J. J. Merchant* (supra).

37. In view of the aforesaid clear formulation of principles on the requirement of expert evidence only in complicated

cases, and where in its discretion, the Consumer Fora feels it is required, the direction in paragraph 106, quoted above in *D'souza* (supra) for referring all cases of medical negligence to a competent doctor or committee of doctors specialized in the field is contrary to the principles laid down by larger Bench of this Court on this point. In *D'souza* (supra) the earlier larger Bench decision in *Dr. J. J. Merchant* (supra) has not been noticed.

38. Apart from being contrary to the aforesaid two judgments by larger Bench, the directions in paragraph 106 in *D'souza* (supra) is also contrary to the provisions of the said Act and the Rules which is the governing statute.

39. Those directions are also contrary to the avowed purposes of the Act. In this connection we must remember that the Act was brought about in the background of worldwide movement for consumer protection. The Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. Thereupon on an extensive discussions and negotiations among various countries on the scope and content of such impending legislation certain guidelines were arrived at. Those guidelines are:-

"Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives:-

To assist countries in achieving or maintaining adequate protection for their population as consumers.

To facilitate production and distribution patterns responsive to the needs and desires of consumers.

To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers.

To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.

To facilitate the development of independent consumer groups.

To further international cooperation in the field of consumer protection.

To encourage the development of market conditions which provide consumers with greater choice at lower prices."

40. A three-Judge Bench of this Court in *State of Karnataka v. Vishwabharathi House Building Coop. Society & Others,* (2003) 2 SCC 412, referred to those guidelines in paragraph 6. This Court further noted that the framework of the Act was provided by a resolution dated 9.4.1985 of the General Assembly of the United Nations Organization known as Consumer Protection Resolution No. 39/248, to which India was a signatory.

41. After treating the genesis and history of the Act, this Court held that that it seeks to provide for greater protection of the interest of the consumers by providing a Fora for quick and speedy disposal of the grievances of the consumers. These aspect of the matter was also considered and highlighted by this Court in *Lucknow Development Authority v. M.K. Gupta,* [(1994) 1 SCC 243], in *Charan Singh v. Healing Touch Hospital* [(2000) 7 SCC 668] as also in the case of *Spring*

Meadows Hospital v. Harjol Ahluwalia [(1998) 4 SCC 39] and in the case of *India Photographic Co. Ltd. v. H.D. Shourie* [(1999) 6 SCC 428].

42. It is clear from the statement of objects and reasons of the Act that it is to provide a forum for speedy and simple redressal of consumer disputes. Such avowed legislative purpose cannot be either defeated or diluted by superimposing a requirement of having expert evidence in all cases of medical negligence regardless of factual requirement of the case. If that is done the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man.

43. In *Spring Meadows* (supra) this Court was dealing with the case of medical negligence and held that in cases of gross medical negligence the principle of *res ipsa loquitur* can be applied. In paragraph 10, this Court gave certain illustrations on medical negligence where the principle of *res ipsa loquitur* can be applied.

44. In *Postgraduate Institute of Medial Education and Research, Chandigarh v. Jaspal Singh and others,* (2009) 7 SCC 330, also the Court held that mismatch in transfusion of blood resulting in death of the patient, after 40 days, is a case of medical negligence. Though the learned Judges have not used the expression *res ipsa loquitur* but a case of mismatch blood transfusion is one of the illustrations given in various textbooks on medical negligence to indicate the application of *res ipsa loquitur*.

45. In the treaties on Medical Negligence by Michael Jones, the learned author has explained the principle of *res ipsa loquitur* as essentially an evidential principle and the learned author opined that the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The principle has

been explained in the case of *Scott v. London & St. Katherine Docks Co.* [reported in (1865) 3 H & C. 596], by Chief Justice Erle in the following manner:-

> "...where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

46. The learned author at page 314, para 3-146 of the book gave illustrations where the principles of *res ipsa loquitur* have been made applicable in the case of medical negligence. All the illustrations which were given by the learned author were based on decided cases. The illustrations are set out below:-

* "Where a patient sustained a burn from a high frequency electrical current used for "electric coagulation" of the blood [See *Clarke v. Warboys, The Times,* March 18, 1952, CA];

* Where gangrene developed in the claimant's arm following an intramuscular injection [*See Cavan v. Wilcox* (1973) 44 D.L.R. (3d) 42];

* When a patient underwent a radical mastoidectomy and suffered partial facial paralysis [See *Eady v. Tenderenda* (1974) 51 D.L.R. (3d) 79, SCC];

* Where the defendant failed to diagnose a known complication of surgery on the patient's hand for Paget's disease[See *Rietz v. Bruser* (No.2) (1979) 1 W.W.R. 31, Man QB.];

* Where there was a delay of 50 minutes in obtaining expert obstetric assistance at the birth of twins when the medical evidence was that at the most no more than 20 minutes should elapse between the birth of the first and the second twin [See *Bull v. Devon Area Health Authority* (1989), (1993) 4 Med. L.R. 117 at 131.];

* Where, following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by bypoxia for a period of four to five minutes [See *Coyne v. Wigan Health Authority* {1991) 2 Med. L.R. 301, QBD];

* Where, following a routine appendisectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma [See *Lindsey v. Mid-Western Health Board* (1993) 2 I.R. 147 at 181];

* When a needle broke in the patient's buttock while he was being given an injection [See *Brazier v. Ministry of Defence* (1965) 1 Ll. Law Rep. 26 at 30];

* Where a spinal anaesthetic became contaminated with disinfectant as a result of the manner in which it was stored causing paralysis to the patient [See *Roe v. Minister of Health* (1954) 2 Q.B. 66. See also *Brown v. Merton, Sutton and Wandsworth Area Health Authority* (1982) 1 All E.R. 650];

* Where an infection following surgery in a "well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [See *Hajgato v. London Health Association* (1982) 36 O.R. (2d) 669 at 682]; and

* Where an explosion occurred during the course of administering anaesthetic to the patient when the technique had frequently been used without any

mishap [*Crits v. Sylvester* (1956) 1 D.L.R. (2d) 502]."

47. In a case where negligence is evident, the principle of *res ipsa loquitur* operates and the complainant does not have to prove anything as the thing (*res*) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.

48. If the general directions in paragraph 106 in *D'souza* (supra) are to be followed then the doctrine of *res ipsa loquitur* which is applied in cases of medical negligence by this Court and also by Courts in England would be redundant.

49. In view of the discussions aforesaid, this Court is constrained to take the view that the general direction given in paragraph 106 in *D'souza* (supra) cannot be treated as a binding precedent and those directions must be confined to the particular facts of that case.

50. With great respect to the Bench which decided *D'souza* (supra) this Court is of the opinion that the directions in *D'souza* (supra) are contrary to (a) the law laid down in paragraph 37 of *Indian Medical Association* (supra), (b) and paragraph 19 in *Dr. J.J. Merchant* (supra), (c) those directions in paragraph 106 of *D'souza* (supra) equate medical negligence in criminal trial and negligence fastening civil liability whereas the earlier larger Bench in *Mathew* (supra) elaborately differentiated between the two concepts, (d) Those directions in D'souza (supra) are contrary to the said Act which is the governing statute, (d) those directions are also contrary to the avowed purpose of the Act, which is to provide a speedy and efficacious remedy to the consumer. If those general directions are followed then in many cases the remedy under the said Act will become illusory, (f) those directions run contrary to principle of '*Res ipsa loquitur'* which has matured into a rule of law in some cases of medical negligence where negligence is evident and obvious.

51. When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered *'Per incuriam'*. This concept of *'Per incuriam*' has been explained in many decisions of this Court. Justice Sabyasachi Mukharji (as his Lordship then was) speaking for the majority in the case of *A.R. Antulay vs. R.S. Nayak and another* reported in (1988) 2 SCC 602 explained the concept in paragraph 42 at page 652 of the report in following words:-

> "*Per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

52. Subsequently also in the Constitution Bench judgment of this Court in *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh vs. Presiding Officer, Labour Court, Chandigarh and others* reported in (1990) 3 SCC 682, similar views were expressed in paragraph 40 at page 705 of the report.

53. The two-Judge Bench in *D'souza* has taken note of the decisions in *Indian Medical Association* and *Mathew,* but even after taking note of those two decisions, *D'souza* (supra) gave those general directions in paragraph 106 which are contrary to the principles laid down in both those larger Bench decisions. The larger Bench decision in *Dr. J.J. Merchant* (supra) has not been noted in *D'souza* (supra). Apart from that, the directions in paragraph 106 in *D'souza* (supra) are contrary to the provisions of the governing statute. That is why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before consumer Fora. Those directions are also inconsistent with the avowed purpose of the said Act.

54. This Court however makes it clear that before the consumer Fora if any of the parties wants to adduce expert evidence, the members of the Fora by applying their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of Fora especially when retired judges of Supreme Court and High Court are appointed to head National Commission and the State Commission respectively. Therefore, these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence. When the Fora finds that expert evidence is required, the Fora must keep in mind that an expert witness in a given case normally discharges two functions. The first duty of the expert is to explain the technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Fora in deciding whether the acts or omissions of the medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases the question whether a medical practitioner or the hospital is negligent or not is a mixed question of fact and law and the Fora is not bound in every case to accept the opinion of the expert witness. Although, in many cases the opinion of the expert witness may assist the Fora to decide the controversy one way or the other.

55. For the reasons discussed above, this Court holds that it is not bound by the general direction given in paragraph 106 in *D'souza* (supra). This Court further holds that in the facts and circumstances of the case expert evidence is not required and District Forum rightly did not ask the appellant to adduce expert evidence. Both State Commission and the National Commission fell into an error by opining to the contrary. This Court is constrained to set aside the orders passed by the State

Commission and the National Commission and restores the order passed by the District Forum. The respondent no.1 is directed to pay the appellant the amount granted in his favour by the District Forum within ten weeks from date.

56. The appeal is thus allowed with costs assessed at Rs.10,000/- to be paid by the respondent No.1 to the appellant within ten weeks.

N.J. Appeal allowed.

UNION OF INDIA
v.
ALOK KUMAR
(Civil Appeal No. 3369 of 2010 etc.)

APRIL 16, 2010

[AFTAB ALAM AND SWATANTER KUMAR, JJ.]

Railway Servants (Discipline and Appeal) Rules, 1968:

r. 9(2) – Inquiry under the Rules – Retired officers of the Department appointed as 'inquiry officer' – Circulars issued by Government permitting such appointment – Appointment challenged being violative of the rules and Public Servants (Inquiries) Act – Held: Recourse to the provisions of the Act not applicable in the facts of the case – Appointment of retired officers as 'inquiry officer' is permissible – Expression 'other authority' u/r. 9(2) does not mean a person in service alone – The Rule does not exclude appointment of retired employees as other authority – Application of principle of exclusion cannot be inferred in absence of specific language in the Rule – The circular is not in conflict with r. 9(2) – It is rather supplementing the Rule – The appointment was also done in public interest – The practice of such appointment has been adopted for a considerable time and there is no bar to such practice – The delinquents having accepted it, cannot challenge it – Delinquents have also not been able to show that they suffered serious prejudice because of appointment of retired officers – Service Law – Departmental Proceedings – Public Servants (Inquiries) Act, 1850.

rr. 9(2) and (6) and Schedule 3 – Interpretation of r. 9(2) – Appointment of retired officers as inquiry officers under the Rules, challenged as violative of spirit of the Rule – Held: The expression 'other authority' is intended to cover a vast field, it should not be given a narrow meaning – The provision

provides a discretion in matter of appointment of 'inquiry officer' – The provision vesting discretion cannot be interpreted in a manner which could take away the discretionary power – Interpretation should be such as to further the object of such rule – A statute should be examined in its entirety and not merely looking at a provision in isolation – Principle of ejusdem generis is attracted where the words preceding the general words pertains to class genus and not heterogeneous collection of items – Principle of ejusdem generis not applicable to r. 9(2) –Rule of contextual interpretation is applicable to the provision in question – Interpretation of Statutes.

Administrative Law – Natural justice – Non-furnishing of documents (issued by CVC) to the delinquent – Whether caused prejudice to delinquent – Held: In absence of proof that CVC advice was taken into consideration in departmental proceedings or that there is any rule providing that implementation of such advice is mandatory, prejudice against the delinquent cannot be presumed – Onus is on the delinquent to show that non-furnishing of the document resulted in de facto prejudice – Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion – It is not permissible to set aside departmental inquiries merely on the basis of apprehended prejudice –On facts, delinquent failed to show any de facto prejudice on account of non-furnishing of the document – Service Law – Departmental Proceedings.

Maxim – *ejusdem generis* – Applicability of.

Doctrines / Principles:

Principle of necessary implication – Applicability of.

Principle of exclusion – Applicability of.

Words and Phrases: 'authority' – Meaning of.

The question for consideration in the appeals was whether under the relevant Rules and provisions of Public Servants (Inquiries) Act, 1850, the Railway Authorities have the jurisdiction to appoint a retired employee of the Department as 'Inquiry Officer' within the ambit of Rule 9(2) of the Railway Servants (Discipline & Appeal) Rules, 1968. In one of the appeals, an additional issue arose as to whether non-furnishing of the Central Vigilance Commission advice/notes, to the delinquent, resulted in prejudice to him.

Allowing the appeals, the Court

HELD: 1.1. The Departmental proceedings against the respondent was restricted to the applicability of Rule 9 of Railway Servants (Discipline and Appeal) Rules, 1968. Thus, recourse to the provisions of the Public Servants (Inquiries) Act, 1850 for the purposes of interpretation or deciding the controvercies in issue was entirely unwarranted in the facts and circumstances of the case. [Para 18] [57-A-B]

1.2. The language of Rule 9(6) shows that there is a discretion vested in the disciplinary authority, enabling it to hold the inquiry itself or get the truth of imputations inquired by any 'other authority' in terms of the Rule. It will be appropriate to read Rule 9(1) and 9(2) together but cautiously. [Para 20] [59-E-F]

1.3. The language of Rule 9 demonstrates that the Rules and the Act are neither inter-dependent nor convey a legislative intent that a departmental inquiry has to be held under both, collectively or at the discretion of the disciplinary authority. The provisions of the Act are applicable to a very limited class of persons i.e., the officers who are removable or liable to be dismissed from service only with the sanction of the Government. The

Rules are applicable to non-gazetted officers and officials of the Department of Railways except Grade-A officers specified under Schedule 3 of the Rules. Thus, under the scheme of the Rules and the Act and particularly, keeping in view the preamble of the Act, it is not correct to say that absolute discretion is vested in the authorities concerned to subject a person to departmental inquiries in terms of the Rules or the Act. They have to exercise the power in accordance with the provisions of the relevant statute. Such an approach is amply indicated even in the language of Rule 9(2). [Para 20] [59-G-H; 60-A-D]

1.4. The Rules require the disciplinary authority to form an opinion that the grounds for inquiry into the truth of imputations of misconduct or misbehaviour against the railway servant exists. Further, that they have enquired into the matter. Then, such inquiry may be conducted by the disciplinary authority itself or it may appoint under the Rules a Board of Inquiry or other authority to enquire into the truth thereof. Formation of such an opinion is a condition precedent for the disciplinary authority, whether it intends to conduct the inquiry under the Rules or under the Act as the case may be. The expression "as the case may be" clearly suggests that law which will control such departmental inquiry would depend upon the class of officers/officials whose misconduct or misbehaviour subject them to such inquiry. If the employee is covered under the Act, the disciplinary authority shall have to appoint an inquiry officer and proceed with the inquiry under the provisions of the Act, whereas if he is covered under the Rules, the procedure prescribed under the Rules will have to be followed. [Para 20] [60-D-G]

1.5. Other important feature in the language of Rule 9(2) is *appoint under this Rule a Board of Inquiry or other*

Authority. **The expression 'other authority' has neither been explained nor defined under the Rules. In terms of Rule 2(1)(2), the words which have not been defined under these Rules shall be deemed to have been assigned the same meaning as assigned under the Railway Act, 1890. Even the Railway Act does not define the term 'authority' though this expression has been used in conjunction with other words in the Rules as well as the Act. In absence of any specific definition or meaning, the court has to rely upon understanding of this expression in common parlance. [Para 21-22] [60-G-H; 61-A-B]**

1.6. In common parlance, the word 'authority' is understood to be power to exercise and perform certain duties or functions in accordance with law. Authority may vest in an individual or a person by itself or even as a delegatee. It is the right to exercise power or permission to exercise power. Such permission or right could be vested in an individual or a body. It can also be in conferment of power by one person to another. This expression has been used differently in different statutes and can be given a different meaning or connotation depending upon the context in which it is used. The purpose and object of using such expression should be understood from the provisions of the relevant law and the purpose sought to be achieved. [Para 22] [61-C-F]

Farlex Free Dictionary; Oxford Dictionary; Law Lexicon, **2nd Edition, 1997 pg. 171, referred to**

1.7. The expression 'other authority' appearing in Rule 9(2) is intended to cover a vast field and there is no indication of the mind of the framers that the expression must be given a restricted or a narrow meaning. It is possible that where the authority is vested in a person or a body as a result of delegation, then delegatee of such authority has to work strictly within the field

delegated. If it works beyond the scope of delegation, in that event it will be beyond the authority and may even, in given circumstances vitiate the action. [Para 24] [64-B-D]

1.8. There is an element of discretion vested in the competent authority to appoint 'other authority' for the purposes of conducting a departmental inquiry. It is a settled principle of interpretation that exclusion must either be specifically provided or the language of the Rule should be such that it definitely follows by necessary implication. The words of the Rule, therefore, should be explicit or the intent should be irresistibly expressed for exclusion. If it was so intended, the framers of the Rule could simply use the expression like 'public servant in office' or 'an authority in office'. Absence of such specific language exhibits the mind of the framers that they never intended to restrict the scope of 'other authority' by limiting it to the serving officers/officials. The principle of necessary implication further requires that the exclusion should be an irresistible conclusion and should also be in conformity with the purpose and object of the rule. [Para 26] [65-A-D]

1.9. It is not correct to say that the framers of the Rules have excluded appointment of former employees of Railway Department as other authority (inquiry officer) under the provisions u/r. 9(2). An exclusion clause should be reflected in clear, unambiguous, explicit and specific terms or language, as in the clauses excluding the jurisdiction of the court the framers of the law apply specific language. In some cases, as it may be, such exclusion could be read with reference to irresistible implicit exclusion. Application of principle of exclusion can hardly be inferred in absence of specific language. [Para 27] [65-E-F]

New Moga Transport Co. v. United India Insurance Co. Ltd. **AIR 2004 SC 2154, referred to.**

1.10. The inquiry officer appointed by the disciplinary authority is a delegatee and has to work within the limited authority so delegated to him. The charges and article of charges and imputations are served by the disciplinary/ competent authority. The inquiry report is submitted again to the competent authority which is expected to apply its mind to the entire record and then decide whether any punishment should be imposed upon the delinquent officer or not. Thus, all substantive functions are performed by the disciplinary or the specified authority itself. It is only an interregnum inquiry. It is conducted by the delegatee of the said authority. That being the purpose and specially keeping in mind the language of Rule 9(2), it cannot be said that 'other authority' has to be a person in service alone. [Para 28] [66-B-E]

Ravi Malik v. National Film Development Corporation Ltd. and Ors. **2004 (13) SCC 427, distinguished.**

1.11. The Rule has not specified any qualifications or pre-requisites which need to be satisfied before a person can be appointed as an inquiry officer. It has been left to the discretion of the disciplinary authority. Unless such exclusion of a former employee of the Government was spelt out specifically in the Rule, it will be difficult for the Court to introduce that element and the principle of implication simplicitor. [Para 29] [67-F-G]

1.12. The Schedule specifies the powers of the respective authorities to take disciplinary action against the delinquent officer, either in certain terms or even by interpretation, it does not suggest which class of persons should or should not be appointed as inquiry officers. On the contrary, Rule 9(2) specifically empowers the

Disciplinary Authority to inquire into the matter itself or appoint another authority to conduct the inquiry. In other words, the functions of the Inquiry Officer are that of a delegating nature and this delegation *ex facie,* is limited delegation. An Inquiry Officer is not even entitled to suggest the punishment unless the Rule so requires specifically, which is not the case here. It is a settled rule that the provisions of an Act/Rules should be examined in their entirety along with the scheme before a particular meaning can be given to an expression or sentence used in a particular language. Thus the Rules must be examined in their entirety along with the conditions of the Schedule and not merely look at Rule 9(2) in isolation. [Para 32] [70-F-H; 71-A-B]

1.13. It is not correct to say that in view of the language of Rule 9(2), the expression "other authority" would have to be read *ejusdem generis* to the earlier part of Rule 9(2) and that they must take colour from the earlier part of the Rule. The rule of e*jusdem generis* is applied where the words or language of which in a Section is in continuation and where the general words are followed by specific words that relates to a specific class or category. The maxim *ejusdem generis* is attracted where the words preceding the general word pertains to class genus and not a heterogeneous collection of items. The language of Rule 9(2), on its plain reading shows that the words are disjunctive and therefore, this principle of interpretation would be hardly applicable to the facts of the present case. [Paras 34, 35, 36 and 37] [71-E-F; 72-B-C, G; 73-A]

Commissioner of Income Tax, Udaipur, Rajasthan vs. Mcdowell and Company Limited **2009 (10) SCC 755, distinguished.**

1.14. It will be useful to apply the rule of contextual interpretation to the provisions of Rule 9. It would not be

permissible to import any meaning or make additions to the plain and simple language of Rule 9(2) in relation to "other authority." The rule of contextual interpretation requires that the court should examine every word of statute in its context, while keeping in mind the preamble of the statute, other provisions thereof, pari material statutes, if any, and the mischief intended to be remedied. Context often provides a key to the meaning of the word and the sense it carries. When the rules and regulations have been framed dealing with different aspects of the service of the employees, the courts would attempt to make a harmonious construction and try to save the provision, not strike it down rendering the provision ineffective. The Court would normally adopt an interpretation which is in line with the purpose of such regulations. The rule of contextual interpretation can be purposefully applied to the language of Rule 9(2). The legislative background and the object of both the Rules and the Act is not indicative of any implied bar in appointment of former employees as inquiry officers. [Para 38] [73-E-H; 74-A-B]

Gudur Kishan Rao v. Sutirtha Bhattachaarya **(1998) 4 SCC 189;** *Nirmal Chandra Bhattacharjee v. Union of India* **1991 (Supp (2) SCC 363;** *Central Bank of India v. State of Kerala* **(2009) 4 SCC 94, relied on.**

Housing Board of Haryana v. Haryana Housing Board Employees Union **(1996) 1 SCC 95, referred to.**

1.15. There is no conflict, much less the contradiction between the language of Rule 9(2) and the circular of 1998 issued by the appellants which contemplated preparation of a panel of former officers/ employees of the railway department, who can be appointed as inquiry officers to conduct the departmental inquiry as the disciplinary/competent authority. The circular only aids Rule 9(2) further while saying that in the

interest of the administration and in consonance with the Rules, the former/retired officers of the railway department who satisfy the eligibility criteria can be appointed as inquiry officer and submit their report to the disciplinary authority in accordance with law. It is clear that the circular issued is only supplementing Rule 9(2) and is in no way in conflict with the language or spirit of Rule 9(2). When a circular is issued for the purposes of supplementing the removal of ambiguity in the Rule or to achieve the purpose of the Rule more effectively, it can hardly be said that there is a conflict between the two. [Paras 30 and 31] [69-B-D; F-G]

1.16. While examining the provisions of vesting of discretion, it cannot be said that they should be interpreted in a manner which would take away the discretion contemplated under the Rule. Rather it would be appropriate to adopt an interpretation which would further the object of such rule. Once there is no conflict, then the Rule and the circular should be harmoniously read. [Para 31] [70-A-B-E]

Union of India and Ors. v. Virpal Singh Chauhan and Ors. **1995 (6) SCC 684, referred to.**

1.17. There is no challenge in any of the applications filed before the Tribunal to any of the circulars. By passage of time and practice the competent authorities and even the delinquent officers in disciplinary cases have given effect to these circulars and they were treated to be good in law. It is only in the arguments addressed before this Court, where it is suggested that these circulars supersede or are in conflict with the Rules. [Para 40] [74-E-G]

1.18. It is not opposed to any canons of service jurisprudence that a practice cannot adopt the status of an instruction, provided it is in consonance with law and

has been followed for a considerable time. This concept is not an absolute proposition of law but can be applied depending on the facts and circumstances of a given case. [Para 41] [74-G-H; 75-A]

Confederation of Ex-Service Man Associations and Ors. v. Union of India and Ors. **(2006) 8 SCC 699, relied on.**

1.19. A practice adopted for a considerable time, which is not violative of the Constitution or otherwise bad in law or against public policy can be termed good in law as well. What has been part of the general functioning of the authority concerned can safely be adopted as good practice, particularly, when such practices are clarificatory in nature and have been consistently implemented by the concerned authority, unless it is in conflict with the statutory provisions or principal document. A practice which is uniformly applied and is in the larger public interest may introduce an element of fairness. A good practice of the past can even provide good guidance for future. This accepted principle can safely be applied to a case where the need so arises, keeping in view the facts of that case. [Para 42] [75-E-H; 76-A]

Deputy Commissioner of Police and Ors. vs. Mohd. Khaja Ali **2000 (2) SLR 49, relied on.**

1.20. The practice of appointing former employees had been implemented for quite some time in the Department. This practice is not opposed to any statutory provision or even public policy. To bar such a practice, there has to be a specific prohibition under the statutory provisions. [Para 43] [76-B-C]

1.21. In the issuance of the circulars by the Railways, larger public interest is served. The background stated by the appellants necessitating the issuance of these circulars, clearly stated that large number of cases of

departmental inquiries are pending and have not attained finality, primarily for the non-availability of the inquiry officers. Even that consideration would tilt the balance, in achieving larger public purpose and interest, rather than to take an approach which would add to the misery of the Railway officials who are facing departmental inquiries. [Para 44] [76-C-E]

1.22. In the present case even the respondents have participated in the entire inquiry and received the order of punishment without any protest. They, in fact, have admitted to the established practice of appointment of former railway employees as inquiry officers. [Para 45] [76-F-G]

2.1. There is nothing on record to show that the alleged CVC notes have actually been taken into consideration and that the same have affected the mind of the disciplinary authority while considering the defence of the delinquent officer and imposing punishment upon him. Unless such notes were actually considered and had some prejudicial effect to the interest of the delinquent officer, it will not be necessary for the Court to interfere in the departmental inquiry proceedings on that ground. All these ingredients are not satisfied in the records. It is a settled rule of departmental proceedings that, it is for the delinquent officer to specifically raise such an issue and discharge the onus of prejudice. [Paras 49 and 52] [78-E; 79-D-F]

Sunil Kumar Banerjee v. State of West Bengal and Ors. **1980 (3) SCC 304;** *State Bank of India and Ors. v. D.C. Aggarwal and Anr.* **1993 (1) SCC 13, referred to.**

2.2. Unless the Rules so require, advice of the CVC is not binding. In absence of any specific rule that seeking advice and implementing thereof is mandatory, it will not be just and proper to presume that there is

prejudice to the concerned officer. Even in the cases where the action is taken without consulting the Vigilance Commission, it necessarily will not vitiate the order of removal passed after inquiry by the departmental authority. [Para 54] [81-C-E]

State of A.P. and Anr. v. Dr. Rahimuddin Kamal **1997 (3) SCC 505;** *Deokinandan Prasad v. State of Bihar* **1971 (2) SCC 330, relied on.**

2.3. Some element of prejudice is essential before an order of imposing penalty can be interfered with by the court, particularly when the inquiry otherwise had been conducted in accordance with law and no grievance was raised by the respondent on that behalf except the points raised for consideration of the Tribunal. Thus, no statutory rule or regulation has been violated by the appellant nor any CVC notes were actually taken into consideration for imposing the punishment upon the respondent. [Para 55] [82-D-F]

2.4. Earlier, in some of the cases, this Court had taken the view that breach of principle of natural justice was in itself a prejudice and no other *'de facto'* prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where the Rule is merely dictatory the element of *de facto* prejudice needs to be pleaded and shown. With the development of law, rigidity in these Rules is somewhat relaxed. The instance of *de facto* prejudice has been accepted as an essential feature where there is violation of non-mandatory rules or violation of natural justice as it is understood in its common parlance. [Para 57] [83-C-E]

S.L. Kapoor v. Jagmohan **1980 (4) SCC 379;** *K.L. Tripathi v. State Bank of India* **(1984) 1 SCC 43;** *ECIL v. B. Karunakar* **(1993) 4 SCC 727;** *Haryana Financial Corporation v. Kailash Chandra Ahuja* **2008 (9) SCC 31, relied on.**

2.5. In a departmental inquiry where the Department relies upon a large number of documents, majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal documents have resulted in *de facto* prejudice and he has been put to a disadvantage as a result thereof. In the light of the peculiar facts and circumstances of the present case, it is obligatory upon the respondents to show that they have suffered some serious prejudice because of appointment of retired Railway officers as inquiry officers. The respondents have not satisfied this test of law. [Para 57] [83-E-G; 84-A-B]

2.6. The well established canons controlling the field of *bias* in service jurisprudence can reasonably extend to the element of prejudice as well in such matters. Prejudice *de facto* should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default, which relates statutory violations. It will not be permissible to set aside the departmental inquiries in any of these classes merely on the basis of apprehended prejudice. [Para 61] [86-E-F]

2.7. *De facto* **prejudice is one of the essential ingredients to be shown by the delinquent officer before an order of punishment can be set aside, of course, depending upon the facts and circumstances of a given case.** *Judicia posteriora sunt in lege fortiori.* **Prejudice normally would be a matter of fact and a fact must be pleaded and shown by cogent documentation to be true. Once this basic feature lacks, the appellant may not be able to persuade the Court to interfere with the**

departmental inquiry or set aside the orders of punishment. [Para 63] [88-B-D]

Case Law Reference

2004 (13) SCC 427	**distinguished.**	**Para 26**
AIR 2004 SC 2154	**referred to.**	**Para 27**
1995 (6) SCC 684	**referred to.**	**Para 30**
2009 (10) SCC 755	**distinguished.**	**Para 34**
(1998) 4 SCC 189	**relied on.**	**Para 39**
(1991) Supp (2) SCC 363	**relied on.**	**Para 39**
(2009) 4 SCC 94	**relied on.**	**Para 39**
(1996) 1 SCC 95	**referred to.**	**Para 39**
(2006) 8 SCC 699	**relied on.**	**Para 41**
2000 (2) SLR 49	**relied on.**	**Para 42**
1980 (3) SCC 304	**referred to.**	**Para 51**
1993 (1) SCC 13	**referred to.**	**Para 51**
1997 (3) SCC 505	**relied on.**	**Para 54**
1971 (2) SCC 330	**relied on.**	**Para 54**
1980 (4) SCC 379	**relied on.**	**Para 58**
(1984) 1 SCC 43	**relied on.**	**Para 59**
(1993) 4 SCC 727	**relied on.**	**Para 60**
2008 (9) SCC 31	**relied on.**	**Para 60**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3369 of 2010.

From the Judgment & Order dated 25.2.2008 of the High Court of Lucknow in Writ Petition 252 of 2008.

WITH

C.A. Nos. 3370, 3372, 3373, 3374, 3375, 3376 of 2010.

S. Wasim A. Qadri, Jubair Ahmad Khan, Anand Verma, Minnat Ullah, A. K. Sharma, Ron Bastin for the Appellant.

P.P. Khurana, Santosh Kumar, Mushtaq Ahmad, S. Prasad, Ambar Qamaruddin, Manoj Prasad, Satyendra Kashyap, Sadashiv Gupta, Vishal Somany for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Delay condoned in SLP (C) No. 25293 of 2008.

2. Leave granted.

3. This judgment shall dispose of all the above mentioned appeals as common question of law on somewhat similar facts arise in all the appeals for consideration of this Court.

4. The Union of India being aggrieved by the judgment of the High Court of Judicature at Allahabad, Lucknow Bench dated 25th February, 2008 has filed the present appeals under Article 136 of the Constitution of India. The High Court declined to interfere with the Order passed by the Central Administrative Tribunal, Lucknow Bench (hereinafter referred to as 'the Tribunal') wherein the Tribunal, in exercise of its powers under Section 19 of the Central Administrative Tribunal Act had set aside the orders of punishment passed by the Disciplinary Authority and the Appellate Authority. However, the High Court granted liberty to the Disciplinary Authority to conduct the inquiry afresh from the stage of nomination of the inquiry officer.

5. A simple but question of some significance under service jurisprudence falls for consideration in the present appeals, whether or not under the relevant Rules and provisions of the Act, the Railway Authorities have the jurisdiction to

appoint a retired employee of the Department as 'Inquiry Officer' within the ambit of Rule 9(2) of the Railway Servants (Discipline & Appeal) Rules, 1968 (for short referred to as 'the Rules').

6. The facts necessary for dealing with this batch of appeals can be summarily stated. The respondents in all these appeals are the members in service of the Railway Establishment. Alok Kumar, respondent in SLP (C) No. 25293 of 2008, is a Group-A officer, while in all other appeals the respondents are from clerical cadre of the Railway Department. This is primarily the only distinguishing feature in the facts of the present appeals. The High Court as well as the Tribunal in all these cases recorded the finding that a retired officer of the Railways cannot be appointed as an inquiry officer within the meaning of the provisions of Rule 9 of the Rules.

7. Keeping in view the common question of law that has been answered against Union of India, it may not be necessary for us to refer to the facts of each case in detail. Suffice it to notice the facts in some detail in Shri Alok Kumar's case. Shri Alok Kumar, respondent, an officer of the Indian Railway Services of Engineers was appointed as Senior Divisional Engineer and was one of the Members of the Tender Committee as well. It is the case of the appellants before us that some irregularities of the Tender Committee were noticed.

8. The Competent Authority on 11th September, 2001 thus served a charge sheet upon the delinquent officer under Rule 9 of the Rules, calling upon him to render his explanation with regard to the Article of Charges and imputations stated therein. It was alleged that Shri Alok Kumar, as convener member of the Committee besides the official position he was holding, submitted a brief calling for tenders on the basis of highly inflated estimates with a view to justify award of contract at very high rates. It was also alleged that he did not submit proper information before the Tender Committee and deliberately misled the other members of the Committee. The Tender

Committee which met on 13th July, 1999, upon comparing the rates quoted by M/s Rajpal Builders with the estimated tender value, had found that these were (–) 1.7% lower than the estimated rates.

9. In short, it was stated that by misusing his official status he had awarded the contract to the contractor of the Department at high rates. To this, the delinquent filed reply denying the Article of Charges. One Shri J.K. Thapar, retired CAO/FOIS, Northern Railways was appointed as an Inquiry Officer. The inquiry was conducted by him during the year 2001-02. The entire file including the Central Vigilance Commission (for short 'CVC') advice was also placed before the competent authority. The Disciplinary Authority expressed disagreement and issued a Memorandum dated 6th May, 2003 giving a chance to Shri Alok Kumar for making a representation. The Railway Board vide its letter dated 14.6.2004, passed an order imposing punishment upon the respondent of reduction by one stage in the time scale of pay for a period of one year.

10. Aggrieved by this Order of punishment, the respondent preferred an appeal which came to be decided by the Ministry of Railways. The Competent Authority rejected the same vide Order dated 18th July, 2005. Since the respondent could not get any relief, he filed an Original Application No. 458 of 2006 before the Tribunal against the orders of the Disciplinary Authority and the Appellate Authority. Different points were raised in the application by the respondent, however finally only two issues were raised before the Tribunal which were noticed in paragraph 6 of its judgment as under:-

> "(a) Whether, CVC's advice should be made available to the defender and
>
> (b) Whether a retired person can be appointed as inquiry officer."

11. The Tribunal while noticing the provisions of Rule 9 (2)

of the Rules took the view that the Disciplinary Authority, with an intention to examine the truth of any imputation of misconduct or misbehaviour against the Railway servant, can conduct an inquiry itself or appoint a Board of Inquiry or other authority under the Rules. However, it held that even on the strength of the Circular relied upon by the present appellants issued by the Railways, empowering them to prepare a panel of retired officers to be nominated as inquiry officers; the appellants have no authority to appoint a former employee as 'Inquiry Officer'. The Tribunal also took the view that the orders of punishment were vitiated for non-supply of copy of advice/notes given by the CVC and it was mandatory on the part of the Disciplinary Authority to furnish the same to the delinquent. Thus on the basis of these findings, the impugned orders were set aside in all the cases. The High Court accepted the view of the Tribunal and Writ Petition No. 252 of 2008 filed by the Union of India, and other connected writ petitions were dismissed by the High Court giving rise to the present petitions.

12. In cases of Satrughan Pal, Suryadeo Tripathi, Ratneshwar Singh and Ram Bahor Yadav, it only needs to be noticed that all are from clerical cadre of booking clerk etc. In these cases, the Tribunal had decided against the appellants relying upon its judgment in the case of Ram Bahor Yadav, while taking the view that retired railway officer could not be appointed as the Inquiry Officer. Consequently, the orders of punishment in each case were set aside.

13. In the case of Ram Bahor Yadav, the High Court affirmed the view taken by the Tribunal that the words "other authority" in Rule 9 (2) of the Rules will not include a retired Railway Officer and, that empanelment of retired Railway Officers by the Railway Board's letter dated 29th July, 1998 does not constitute amendment of Rules and consequently set aside the orders of punishment imposed upon the respondents in those cases.

14. The Union of India has challenged the judgment of the

High Court in Ram Bahor Yadav's case in SLP (C) No. 24748 of 2008 and all other judgments in the aforementioned appeals. With the exception of Alok Kumar's case, in all the other cases, as is evident from the above narrated facts, we would be concerned with the interpretation of the Rules and provisions of the Act read with the Circular issued by the Railways Department/Board to answer the controversy, whether a retired Railway Officer can be appointed as Inquiry Officer for the purposes of conducting departmental inquiries against the employees of the Railway Department. In case of Shri Alok Kumar an additional issue will have to be dealt with by us with regard to the alleged non-furnishing of the Central Vigilance Commission advice/notes, to the delinquent and its effect on the merits of the case.

15. Before we proceed to examine the relevant provisions, we may also notice that a different view was taken by the Bench of Guwahati High Court in the case of *Kendriya Vidyala Sangthan v. Vijay Bhatnagar,* Writ Petition No. 6795 of 2005 than the view taken by the Allahabad High Court, Lucknow Bench, in the impugned judgment. The Bench of Guwahati High Court while dealing with Rule 14 (2) of the CCS Rules had set aside the judgment of the Tribunal and held that a retired person could be appointed as Inquiry Officer which judgment is heavily relied upon by the appellants before us.

DISCUSSION ON LAW

16. During the British regime some of the persons holding high positions, in the governance of the Indian Dominion were found to be acting as autocrat. Their behaviour as public servants became a cause of concern for the Government. In order to have a check on this, a Bill was introduced in the Legislature on 1st November, 1850. By Act 1 of 1897 it was enacted as 'The Public Servants (Inquiries) Act, 1850'. This Act was enacted with an object to amend the law of regulating inquiries into behaviour of public servants, not removable (from their appointments) without the sanction of the Government and

to make the same uniform throughout the Indian Territory. The provisions of this law clearly show that it is a self-sufficient code right from the stage of serving of Articles of Charges which were to be drawn up for the public inquiry to be conducted in the cases of the misbehaviour by public servants, till submission of the records of proceedings to the competent Government. The competent Government on consideration of the report may order taking of further evidence or direct the authority to which the person was subordinate for their opinion and finally pass such orders thereon as may appear consistent with its powers in such cases. Section 3 of this Act which has been referred to and even relied upon by the authorities reads as under:

> "Authorities to whom inquiry may be committed – Notice to accused – The inquiry may be committed either to the Court, Board or other authority to which the person accused is subordinate or to any other person or persons, to be specially appointed by the Government, commissioners for the purpose: notice of which commission shall be given to the person accused ten days at least before the beginning of the inquiry."

17. The Act remained unimplemented as the provisions thereof were hardly invoked by the authorities concerned. The President of India in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, 1950 made the rules termed as the 'Railway Servants Discipline and Appeal (Rules 1968)'. They came into force on 1st October, 1968.

18. The Preamble of the Act also indicates the Legislative intent as to which class of persons the provisions of the Act would be applicable. It is abundantly clear that the persons who are covered under the provisions of the Act are persons who are public servants and not removable from their appointment without sanction of the Government. This criterion has to be specified before the provisions of the Act can be made available, and an inquiry can be conducted under its provisions.

In fact, the language of Sections 2 & 3 of the Act is quite distinguishable from the provisions normally covering the disciplinary action in departmental inquiries. In terms of Section 2, the Government has to form an opinion that sufficient grounds existed for making a formal and public inquiry into the truth of any imputation of misbehaviour by any person in the service of the Government, who cannot be removed from his appointment without its sanction. Such an inquiry could be conducted by a Board or other authority to which the said Officer is subordinate or any other person or persons to be specifically appointed by the Government. However, in terms of Section 4, the Government, where it thinks fit to conduct the prosecution, shall nominate some person to conduct the same on its behalf. Under this Section, the prosecution has to be completed in terms of the provisions of the Act by the persons so appointed or the Commissions so appointed. In other words, inquiry or prosecution has to be conducted strictly in consonance with these provisions. The scope of applicability of this Act cannot be enlarged and it must be construed somewhat narrowly and the persons who are not specifically covered under the provisions of this Act cannot be included by implication or exemption. It is a settled rule of interpretation that where the legislature in its wisdom has made an Act applicable to a particular class of persons, there it will be impossible to construe it in a manner so as to enlarge the scope of its applicability. The provisions afore-referred as well as scheme of the Act makes it clear that the provisions are applicable to the public servants who can be removed from service only with the sanction of the Government. In the cases before us, including that of Mr. Alok Kumar, it had not been suggested by either party that they are removable from service only with prior sanction of the Government. In fact, they can be removed by the Disciplinary Authority in accordance with the law. The charge-sheet, which was served in Form No. 5 under Rule 9 of the Rules, did not even refer to the provisions of the Act. The Memorandum, in which the charge-sheet was contained, described him as Senior DE/1 Northern Eastern Railways,

Lucknow and referred to the provisions of Rule 9 and Rule 20 of the Railway Service Conduct Rules 1966. In other words, the competent authority did not direct either a public inquiry or a prosecution under the relevant provisions of the Act. The departmental proceeding against the said respondent was restricted to the applicability of Rule 9 of the 1968 Rules. Thus, recourse to the provisions of the Act for the purposes of interpretation or deciding the controversies in issue was entirely unwarranted in the facts and circumstances of the case in hand.

19. Now, let us examine the ambit, scope and ramifications of the Railway Service Disciplinary Rules, 1968 in relation to the departmental inquiries in the Department of Railways and the delinquent. The Rules in question, noticed at the very threshold, are a complete code in itself. It opens with the words "these rules have been framed under proviso to Article 309 of the Constitution and are applicable to the officers/officials of the Railways". Rule 2 of the Rules defines 'appointing authority', 'disciplinary authority', 'Head of the Department' and 'service' under its different sub-rules. Service is stated to mean, service under the Ministry of Railways and in terms of Rule 3. The Rules are applicable to every railway servant but shall not apply to the class of members or persons indicated in Rule 3 (i) (a) to (d). Rule 5 empowers the competent authority to place a railway servant under suspension and this power is controlled by the provisions of Rule 4 which requires the specified authorities alone to act in terms of Schedule 1 and 2 respectively for passing such orders. These Schedules not only specify the class of employees who can be placed under suspension but also the authority which can pass such orders as well as the authority which shall be the appellate authority for dealing with the grievances raised by the delinquent officer/official. It may be noticed that Schedule 1 deals with a class of non-gazetted railway servants including Grade-B non-gazetted officers/ officials. Schedule-II deals with different grades of railway officers and senior supervisors of non-gazetted staff. Schedule III spells out the class of railway servants covered, authority

empowered to place a railway servant under suspension or impose penalty and its nature as well as the appellate authority. Railway servants of Grade-A and Grade-B are dealt with under this Schedule and the President is vested with full powers. Where the orders are passed by the Railway Board, the appeal lies to the President. The penalties that can be imposed upon a delinquent officer/official for good and sufficient reasons have been spelt out in Rule 6, for which a disciplinary authority has been specified under Rule 7. While Rule 8 deals with authority to institute the proceedings, there is Rule 9 which falls under Part IV of these Rules, which provides the procedure for imposing major penalties. In fact, Rule 9 to Rule 12 are the most relevant provisions which detail the procedure which is to be followed and the imposition of punishments and communication of such orders. Rule 9 contemplates the complete procedure for imposition of major penalty including appointment of inquiry officer and submission of the report by the inquiring authority to the disciplinary authority. Rule 10 specifies the action which can be taken on the submission of the inquiry report. Keeping in view the primary challenge raised in these appeals, it will be useful to refer to the relevant part of Rule 9:

"**Rule 9. Procedure for imposing major penalties**

(1) No order imposing any of the penalties specified in Clauses (v) to (ix) of Rule 6 shall be made except after an inquiry held, as far as may be, in the manner provided in this rule and Rule 10, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.

(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a railway servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the

case may be, [a Board of Inquiry or other authority] to inquire into the truth thereof.

(3) Where a Board of Inquiry is appointed under sub-rule (2) it shall consist of not less than two members, each of whom shall be higher in rank than the Railway servant against whom the inquiry is being held an none of whom shall be subordinate to the other member or members, as the case may be, of such Board.

Explanation:

Where the disciplinary authority itself holds the inquiry, any reference in sub-rule (12) and in sub-rule (14) to sub-rule (25), to the inquiring authority shall be construed as a reference to the disciplinary authority."

20. Sub rule 6 of Rule 9 states that, where it is proposed to hold an inquiry against a railway servant under Rule 9 and Rule 10, there a charge sheet and imputation of conduct and misbehaviour upon the said officer shall be served and the procedure as specified shall be followed. The language of this rule clearly shows that there is a discretion vested in the disciplinary authority, enabling it to hold the inquiry itself or get the truth of imputations inquired by any 'other authority' in terms of the Rule. It will be appropriate to read Rule 9(1) and 9(2) together but cautiously. Rule 9(1) starts with a negative language putting an embargo on passing of an order imposing penalties as specified under clause 5 to clause 9 of Rule 6, major penalties can be imposed except after an inquiry held. The inquiry contemplated can be held as per the procedure spelt out in Rule 9 and Rule 10 of these Rules. The other mode of holding an inquiry is in the manner provided by the Public Service Inquiries Act, 1850, when such inquiries are held under that Act. The language of Rule 9 of the Rules, therefore, clearly demonstrates that the Rules and the Act are neither inter-

dependent nor convey a legislative intent that a departmental inquiry has to be held under both collectively or at the discretion of the disciplinary authority. We have already clarified it above, that the provisions of the Act are applicable to a very limited class of persons i.e., the officers who are removable or liable to be dismissed from service only with the sanction of the Government. The Rules, as framed, are applicable to non-gazetted officers and officials of the Department of Railways except Grade-A officers specified under Schedule 3 of the Rules. Thus, under the scheme of the Rules and the Act and particularly, keeping in view the preamble of the Act, it is not correct to say that absolute discretion is vested in the authorities concerned to subject a person to departmental inquiries in terms of the Rules or the Act. They have to exercise the power in accordance with the provisions of the relevant statute. Such an approach is amply indicated even in the language of Rule 9(2). The Rules require the disciplinary authority to form an opinion that the grounds for inquiry into the truth of imputations of misconduct or misbehaviour against the railway servant exists. Further, that they have enquired into the matter. Then, such inquiry may be conducted by the disciplinary authority itself or it may appoint under the Rules a Board of Inquiry or other authority to enquire into the truth thereof. Formation of such an opinion is a condition precedent for the disciplinary authority, whether it intends to conduct the inquiry under the Rules or under the Act as the case may be. The expression "as the case may be" clearly suggests that law which will control such departmental inquiry would depend upon the class of officers/officials whose misconduct or misbehaviour subject them to such inquiry. If the employee is covered under the Act, the disciplinary authority shall have to appoint an inquiry officer and proceed with the inquiry under the provisions of the Act, whereas if he is covered under the Rules, the procedure prescribed under the Rules will have to be followed.

21. Other important feature in the language of the Rule is *appoint under this Rule a Board of Inquiry or other Authority.*

What shall be the constitution of the Board of Inquiry and how the same would proceed further with the inquiry has been stated in sub-rules 3, 4 and 5 of Rule 9 of the Rules. The expression "other authority" has neither been explained nor defined under the Rules. In terms of Rule 2(1) (2), the words which have not been defined under these Rules shall be deemed to have been assigned the same meaning as assigned under the Indian Railway Act, 1890.

22. Even the Indian Railway Act does not define the term "authority" though this expression has been used in conjunction with other words in the Rules as well as the Act. In absence of any specific definition or meaning we have to rely upon understanding of this expression in common parlance. In common parlance, the word 'authority' is understood to be, power to exercise and perform certain duties or functions in accordance with law. Authority may vest in an individual or a person by itself or even as a delegatee. It is the right to exercise power or permission to exercise power. Such permission or right could be vested in an individual or a body. It can also be in conferment of power by one person to another. This expression has been used differently in different statutes and can be given a different meaning or connotation depending upon the context in which it is used. The purpose and object of using such expression should be understood from the provisions of the relevant law and the purpose sought to be achieved. The word 'authority' is derived from the latin word *auctoritas,* meaning intention, advice, opinion, influence or command which originate from an auctor, indicating that authority originates from a master, leader or author, and essentially is imposed by superior upon inferior either by force of law (structural authority) or by force of argument (sapiential authority)

23. Farlex Free Dictionary explains the word 'authority' as follows:

"Authority n. permission, a right coupled with the power to

do an act or order others to act. Often one person gives another authority to act, as an employer to an employee, a principal to an agent, a corporation to its officers, or governmental empowerment to perform certain functions. There are different types of authority including "apparent authority" when a principal gives an agent various signs of authority to make others believe he or she has authority, "express authority" or "limited authority" which spell out exactly what authority is granted (usually a written set of instructions), "implied authority" which flows from the position one holds, and "general authority" which is the broad power to act for another.

Oxford Dictionary explains the word as under:

"1. (a) The power to enforce laws, exact obedience, command, determine, or judge.

(b) One that is invested with this power, especially a government or body of government officials : land titles issued by the civil authority.

2. Power assigned to another; authorization: Deputies were given authority to make arrests.

Merrium Webster's Law Dictionary, 1996 explains the word as under :

"Authority pl. – ties

1. an official decision of a court used esp. as a precedent.

2. (a) a power to act est. over others that derives from status, position, or office. Example : the authority of the president.

(b) the power to act that is officially or formally granted (as by statute, corporate bylaw, or court order).

3. …….

4 (a) a government agency or corporation that administers a revenue-producing public enterprise. Example : the transit authority

(b) a government agency or public office responsible for an area of regulation. Example : should apply for a permit to the permitting authority."

In Law Lexicon, 2nd Edition, 1997 pg. 171, the word 'authority' has been explained and elucidated as follows :

"A person or persons, or a body, exercising power of command; generally in the plural: as, the civil and military authorities. Power or admitted right to command or to act, whether original or delegated: as the authority of a prince over subjects and of parents over children ; the authority of an agent to act for his principal. An authority is general when it extends to all acts, or all connected with a particular employment, and special when confirmed to a single act.

"Authority, is nothing but a power to do something; it is sometimes given by word, and sometimes by writing; also it is by writ, warrant, commission, letter of attorney & c. and sometimes by law. The authority that is given must be to do a thing lawful: for if it be for the doing anything against law, as to beat a man, take away his goods, or disseise him of his lands this will not be a good authority to justify him that doth it.:

"Authority (In contracts) the lawful delegation of power by one person to another.

Authority (In administrative law) is a body having jurisdiction in certain matters of a public nature.

Authority. Permission. Right to exercise powers; to implement and enforce laws; to exact obedience; to command; to judge. Control over; jurisdiction. Often synonymous with power. The power delegated by a

principal to his agent. The lawful delegation of power by one person to another. Power of agent to affect legal relations of principal by acts done in accordance with principal's manifestations of consent to agent."

24. It is clear from above that there is some unanimity as to what meaning can be given to the expression 'authority'. The authority, therefore, should be understood on its plain language and without necessarily curtailing its scope. It will be more appropriate to understand this expression and give it a meaning which should be in conformity with the context and purpose in which it has been used. The 'other authority' appearing in Rule 9(2) is intended to cover a vast field and there is no indication of the mind of the framers that the expression must be given a restricted or a narrow meaning. It is possible that where the authority is vested in a person or a body as a result of delegation, then delegatee of such authority has to work strictly within the field delegated. If it works beyond the scope of delegation, in that event it will be beyond the authority and may even, in given circumstances vitiate the action.

25. Now, we have to examine the argument of the respondents before the court that the expression 'other authority' shall have to be construed to cover only the persons who are in the service of the railways. In other words, the contention is that the expression 'person' used under Section 3 of the Act and expression 'authority' used under Rule 9(2) contemplates the person to be in service and excludes appointment of an inquiry officer (authority) of a retired railway officer/official.

26. Heavy reliance was placed by the respondents upon the judgment of this Court in the case of *Ravi Malik v. National Film Development Corporation Ltd. & Ors.* [2004 (13) SCC 427]. We have already discussed at some length the scheme of the Rules. As already noticed, we are not required to discuss in any further elaboration the inquiries taken under the Act, inasmuch as none of the respondents before us have been subject to public departmental inquiry under the provisions of

the Act. Rule 9 (2) requires the authority to form an opinion, whether it should hold the inquiry into the truth of imputation of misconduct or misbehaviour against the railway servant itself or should it appoint some other authority to do the needful. Thus, there is an element of discretion vested in the competent authority to appoint 'other authority' for the purposes of conducting a departmental inquiry. It is a settled principle of interpretation that exclusion must either be specifically provided or the language of the rule should be such that it definitely follows by necessary implication. The words of the rule, therefore, should be explicit or the intent should be irresistibly expressed for exclusion. If it was so intended, the framers of the rule could simply use the expression like 'public servant in office' or 'an authority in office'. Absence of such specific language exhibits the mind of the framers that they never intended to restrict the scope of 'other authority' by limiting it to the serving officers/officials. The principle of necessary implication further requires that the exclusion should be an irresistible conclusion and should also be in conformity with the purpose and object of the rule.

27. The learned counsel appearing for the respondents wanted us to accept the argument that provisions of Rule 9 (2) have an implicit exclusion in its language and exclusion is absolute. That is to say, the framers have excluded appointment of former employees of Railway Department as other authority (inquiry officer) under these provisions. We find no merit in this contention as well. An exclusion clause should be reflected in clear, unambiguous, explicit and specific terms or language, as in the clauses excluding the jurisdiction of the court the framers of the law apply specific language. In some cases, as it may be, such exclusion could be read with reference to irresistible implicit exclusion. In our opinion the language of Rule 9(2) does not support the submission of the respondents. Application of principle of exclusion can hardly be inferred in absence of specific language. Reference in this regard can be made to the judgment of this Court in the case

of *New Moga Transport Co. v. United India Insurance Co. Ltd.* [AIR 2004 SC 2154].

28. In the present case, neither of these ingredients appear to be satisfied. Ultimately, what is the purpose of a departmental inquiry? It is, to put to the delinquent officer/official the charges or article of charges and imputation and seek his reply in the event of there being no substance to hold an inquiry in accordance with the rules and principles of natural justice. The inquiry officer appointed by the disciplinary authority is a delegatee and has to work within the limited authority so delegated to him. The charges and article of charges and imputations are served by the disciplinary/competent authority. The inquiry report is submitted again to the competent authority which is expected to apply its mind to the entire record and then decide whether any punishment should be imposed upon the delinquent officer or not. Thus, all substantive functions are performed by the disciplinary or the specified authority itself. It is only an interregnum inquiry. It is conducted by the delegatee of the said authority. That being the purpose and specially keeping in mind the language of Rule 9 (2), we are unable to accept the contention that 'other authority' has to be a person in service alone. Thus, it is not only the persons in service who could be appointed as inquiry officers (other authority) within the meaning of Rule 9(2). Reliance placed by the respondents upon the judgment of this Court in the case of *Ravi Malik* (supra) is hardly of any assistance to them. Firstly, the facts and the Rules falling for consideration before this Court in that case were entirely different. Secondly, the Court was concerned with the expression 'public servant' appearing in Rule 23 (b) of the Service Rules and Regulations, 1982 of the National Film Development Corporation. The Court expressed the view that public servant should be understood in its common parlance and a retired officer would not fall within the meaning of public servant, as by virtue of his retirement he loses the characteristics of being a public servant. That is not the expression with which we are concerned in the present case. Rule 9 (2) as well as

Section 3 of the Act have used a very different expression i.e. 'other authority' and 'person/persons'. In other words, the absence of the word public servant of the Government is conspicuous by its very absence. Thus, both these expressions, even as per the dictum of the Court should be interpreted as understood in the common parlance. Another factor which we may notice is that the definition of the public servant appearing in the Indian Penal Code (for short 'the Code'), reliance upon which was placed by the respondents, was not brought to the notice of the Court while dealing with the case of *Ravi Malik* (supra). In terms of Section 21 of the Code a public servant denotes a person falling under any of the descriptions stated in the provision. While it refers to a different kind of persons it also brings within its ambit every arbitrator or every person to whom any cause or matter has been referred for decision or report by any court or any other competent public authority. Furthermore, as per the 12th clause of inclusion, in this very section, even "every person" can be a public servant. In fact, in terms of Section 21 (a) a person who is in service of the Government or remunerated by fees or commission for the purpose of any public duty of a Government is also a public servant.

29. Thus, a person who is engaged by a competent authority to work on a fee or a fixed remuneration can be a public servant. We fail to understand then how a person engaged for the purposes of performing a delegated function in accordance with law would not be 'other authority' within the meaning of the Rule 9(2). The Rule has not specified any qualifications or pre-requisites which need to be satisfied before a person can be appointed as an inquiry officer. It has been left to the discretion of the disciplinary authority. Unless such exclusion of a former employee of the Government was spelt out specifically in the Rule, it will be difficult for the Court to introduce that element and the principle of implication simplicitor. Another aspect of the matter which would require deliberation of the Court is that, the competent authority in the

Department of Railways as well as the Railway Board, Ministry of Railways, Government of India has issued certain circulars, specifically contemplating preparation of a panel of former officers/employees of the railway department, who can be appointed as inquiry officers to conduct the departmental inquiry as the disciplinary/competent authority. Firstly, the circular is stated to have been issued on 16th July, 1998 wherein it has been noticed by the authorities that a large number of cases are coming up before the Vigilance Department. These cases relate to corruption and other serious irregularities. Number of such cases pertain to non-gazetted staff. An inquiry is essentially conducted before imposition of major penalty in terms of Rule 9(2). Number of cases have been pending at the inquiry stage for a considerable time and cannot be disposed of because of non-completion. So, in order to liquidate the large outstanding position of department cases expeditiously, it was felt necessary to empanel certain retired senior-scale and JA Grade officers who would be relatively free to undertake the inquiries. This further led to the criteria of eligibility, remuneration and the work expected to be performed by the former employees to be appointed as inquiry officers. Again a circular is stated to have been issued on 16th October, 2008 on the same lines and taking a view that the former employees could be appointed as inquiry officers. Of course, the circular of 2008 may not be of great relevancy before us as the charge sheet was served upon the delinquent officer/official much prior to the implementation of this circular. However, the circular of 1998 is relevant.

30. The contention raised before us is that the circular issued by the appellants is in contradiction to the language of Rule 9(2). It is a settled rule that a circular cannot supersede the provisions of the Rules and thus appointment of the former employees of the railway department as inquiry officer is impermissible and the appellants had no jurisdiction to issue such circular. On the other hand, it is contended on behalf of the appellant, that special instructions can be issued by the

department for dealing with its affairs and such circulars are permissible. It is also submitted that, the circular being in furtherance to the provisions of law would even prevail over the Rules without having been issued for a specific purpose. Reliance is placed upon the judgment of this Court in the case of *Union of India & Ors. v. Virpal Singh Chauhan & Ors.* [1995 (6) SCC 684]. Firstly, we are unable to see any conflict, much less the contradiction between the language of Rule 9(2) and the circular of 1998 issued by the appellants. Under Rule 9(2), the disciplinary authority has the discretion to appoint a 'Board of Inquiry' or 'other authority' to conduct inquiry against the delinquent officer/official. The circular only aids it further while saying that in the interest of the administration and in consonance with the Rules, the former/retired officers of the railway department who satisfy the eligibility criteria can be appointed as inquiry officer and submit their report to the disciplinary authority in accordance with law. It is clear that the circular issued is only supplementing Rule 9(2) and is in no way in conflict with the language or spirit of Rule 9(2). The argument advanced on behalf of the respondents is that in the event of clear conflict between circulars and the statutory rules, the circular cannot be permitted to prevail. This argument would be of worth consideration only if the respondents are able to demonstrate before the Court without ambiguity that it is a case of conflict and the circular issued is in terms contrary to the language of the statute.

31. We are unable to see any such conflict or contradiction. When a circular is issued for the purposes of supplementing the removal of ambiguity in the Rule or to achieve the purpose of the Rule more effectively, it can hardly be said that there is a conflict between the two. The matter shall certainly be on a different footing, where the Rule by a specific language or by necessary implication makes such exclusion or provides that a particular class of persons cannot be appointed as authority (inquiry officer). It may also be true in the case where the Rule itself makes it mandatory for the disciplinary authority to appoint

a particular class of persons and no other as inquiry officers. While examining the provisions of vesting of discretion, it cannot be said that they should be interpreted in a manner which would take away the discretion contemplated under the Rule. Rather it would be appropriate to adopt an interpretation which would further the object of such rule. In the case of *Virpal Singh Chauhan* (supra), this Court was concerned with the circular/letters providing for reservation in favour of SC & ST and their operation on the subject of seniority as between reserved and general category candidates. Certain instructions had been issued and after perusing the facts of that case this Court took the view that, the Railway Board circulars which are provided specifically for such a situation and are not being violative of the constitutional provisions, should prevail and given effect to. In that case also it was not brought to the notice of the Court that the letter/circular was in any way inconsistent with the provisions of any law, as in the present case the respondents have failed to demonstrate that the circular issued is in conflict with or opposed to any specific rule enacted under proviso to Article 309 of the Constitution or any other constitutional protection. Once there is no conflict, then the Rule and the circular should be harmoniously read.

32. Another indication under the Rules which is suggested, is non-application of the Rule of strict construction to the provisions with regard to appointment of an Inquiry Officer and where the expressions Appointing Authority, Disciplinary Authority and Appellate Authority have been duly explained and provided for, either under the Rules or in the schedule to these Rules. As0. already noticed, the Schedule specifies the powers of the respective authorities to take disciplinary action against the delinquent officer, either in certain terms or even by interpretation, it does not suggest which class of persons should or should not be appointed as inquiry officers. On the contrary, Rule 9 (2) specifically empowers the Disciplinary Authority to inquire into the matter itself or appoint another authority to conduct the inquiry. In other words, the functions of the Inquiry

Officer are that of a delegating nature and this delegation ex facie, is limited delegation. An Inquiry Officer is not even entitled to suggest the punishment unless the Rule so requires specifically, which is not the case here. It is a settled rule that the provisions of an Act/Rule should be examined in their entirety along with the scheme before a particular meaning can be given to an expression or sentence used in a particular language. Thus we must examine the Rules in their entirety along with the conditions of the Schedule and not merely look at Rule 9 (2) in isolation.

33. Still another aspect of the case can be that, the expression "public servant" cannot be equated to the term "other authority". Both these expressions cannot be treated as inter-changeable or synonymous. They have different connotations and meaning in law. "Public servant" is a term which is well defined and explained in the field of law, while "authority" is a generic term and is used in different places with different meanings and purposes. 'Authority' thus is an expression of wide magnitude and is frequently used not only in legal jurisprudence but also in administrative and executive field. Therefore, it is to our mind not permissible to permit restricted meaning of this term.

34. It was also contended on behalf of the respondents that the competent authority exercising power under Rule 9 (2) is vested with a choice whether to take action under these Rule or under the Act. Emphasis is laid on the language of Rule 9 (2) while submitting that the expression "other authority" would have to be read *ejusdem generis* to the earlier part of Rule 9 (2) and that they must take colour from the earlier part of the Rule. While reliance is placed upon the judgment of this Court in the case of *Commissioner of Income Tax, Udaipur, Rajasthan Vs. Mcdowell and Company Limited* [2009 (10) SCC 755] to contend that the Rules and the provisions of the Act contemplate 'other authority' only as the persons in service. We are not impressed with either of these submissions. Firstly,

the general rule stated in the case of *Mcdowell and Company* (supra) is a matter relating to fiscal laws, the interpretation of which is controlled by the rule of strict construction. We have already discussed at some length that it is not possible for this Court to apply the rule of strict construction to the provisions in question before us. Applicability of such doctrine to the rules of procedure under the service jurisprudence can hardly be justified.

35. The rule of e*jusdem generis* is applied where the words or language of which in a section is in continuation and where the general words are followed by specific words that relates to a specific class or category. This Court in the case of *Mcdowel and Company Ltd.* (supra) while discussing this doctrine at some length held as under:

> "The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of *ejusdem generis*. It applies when:
>
> (1) the statute contains an enumeration of specific words;
>
> (2) the subjects of enumeration constitute a class or category;
>
> (3) that class or category is not exhausted by the enumeration;
>
> (4) the general terms follow the enumeration; and
>
> (5) there is no indication of a different legislative intent.

36. The maxim *ejusdem generis* is attracted where the words preceding the general word pertains to class genus and not a heterogeneous collection of items in the case of Housing Board, Haryana (supra).

37. The language of Rule 9(2), on its plain reading shows that the words are disjunctive and therefore, this principle of interpretation would be hardly applicable to the facts of the present case. It is also incorrect to suggest, much less to argue, that under Rule 9 (2) a discreet choice is vested under the authority concerned. We have already indicated that the Act is applicable to a special class of persons while Rules are applicable to other class of persons including Grade – A to Grade – D. Once the provisions of the Act are attracted, a public inquiry has to be held in accordance with the provisions of the Act. The Rules and the Act, as self-contained codes within themselves, operate in a way without impinging upon the field of the other. There is hardly any discretion vested in the competent authority, it is only for the purposes of conducting an inquiry personally or through some other appointed authority that the discretion is vested. In the event of delegation by the competent authority, the delegatee authority has to function within the limit of the authority delegated to it. At the cost of repetition we may notice that neither in the Rules nor in the provisions of the Act which are independent in their application, there is any requirement or even suggestion that appointment of an authority or Board has to be essentially of a person in service, even a former employee could be appointed so.

38. It will be useful to apply the rule of contextual interpretation to the provisions of Rule 9. It would not be permissible to import any meaning or make additions to the plain and simple language of Rule 9(2) in relation to "other authority." The rule of contextual interpretation requires that the court should examine every word of statute in its context, while keeping in mind the preamble of the statute, other provisions thereof, pari material statutes, if any, and the mischief intended to be remedied. Context often provides a key to the meaning of the word and the sense it carries. It is also a well established and cardinal principle of construction that when the rules and regulations have been framed dealing with different aspects of the service of the employees, the Courts would attempt to make

a harmonious construction and try to save the provision, not strike it down rendering the provision ineffective. The Court would normally adopt an interpretation which is in line with the purpose of such regulations. The rule of contextual interpretation can be purposefully applied to the language of Rule 9 (2), particularly to examine the merit in the contentions raised by respondent before us. The legislative background and the object of both the Rules and the Act is not indicative of any implied bar in appointment of former employees as inquiry officers.

39. These principles are well established and have been reiterated with approval by the courts, reference can usefully be made to the judgments of this court in the cases of *Gudur Kishan Rao v. Sutirtha Bhattachaarya,* [(1998) 4 SCC 189], *Nirmal Chandra Bhattacharjee v. Union of India,* [1991 (Supp (2) SCC 363], *Central Bank of India v. State of Kerala,* [(2009) 4 SCC 94], *Housing Board of Haryana v. Haryana Housing Board Employees Union,* [(1996) 1 SCC 95].

40. The circulars have been issued by the Department of Railways, from time to time, to recognize preparation of panels for appointing inquiry officers as per the terms and conditions, including the eligibility criterion stated in those circulars. We may notice here that, there is no challenge in any of the applications filed before the Tribunal to any of the circulars, despite the fact that they have been duly noticed in the impugned judgments. By passage of time and practice the competent authorities and even the delinquent officers in disciplinary cases have given effect to these circulars and they were treated to be good in law. It is only in the arguments addressed before this Court, where it is suggested that these circulars supersede or are in conflict with the Rules. This part of the contention we have already rejected.

41. It is not opposed to any canons of service jurisprudence that a practice cannot adopt the status of an instruction,

provided it is in consonance with law and has been followed for a considerable time. This concept is not an absolute proposition of law but can be applied depending on the facts and circumstances of a given case. This Court in the case of Confederation of *Ex-Service Man Associations and Ors. v. Union of India and Ors.,* [(2006) 8 SCC 699] was concerned with providing of Medicare /Medical aid to ex-servicemen and the scheme framed by the Government to provide ex-defence personnel medical services provided they paid "one-time contribution", was held not to be arbitrary and based on the practice followed earlier. In such circumstances, this Court held as under:

> "In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctrine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in the absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised."

42. A practice adopted for a considerable time, which is not violative of the Constitution or otherwise bad in law or against public policy can be termed good in law as well. It is a settled principle of law, that practice adopted and followed in the past and within the knowledge of the public at large, can legitimately be treated as good practice acceptable in law. What has been part of the general functioning of the authority concerned can safely be adopted as good practice, particularly, when such practices are clarificatory in nature and have been consistently implemented by the concerned authority, unless it is in conflict with the statutory provisions or principal document. A practice which is uniformly applied and is in the larger public interest may introduce an element of fairness. A good practice of the past can even provide good guidance for future. This accepted principle can safely be applied to a case where the

need so arises, keeping in view the facts of that case. This view has been taken by different High Courts and one also finds glimpse of the same in a judgment of this Court in the case of *Deputy Commissioner of Police & Ors. Vs. Mohd. Khaja Ali* (2000 (2) SLR 49).

43. There can be hardly any doubt that the practice of appointing former employees had been implemented for quite some time in the Department. We are unable to see how this practice is opposed to any statutory provision or even public policy. To bar such a practice, there has to be a specific prohibition under the statutory provisions, then alone the argument raised on behalf of the respondents could have some merit.

44. We may also notice that in the issuance of the circulars by the Railways, larger public interest is served. The background stated by the appellants necessitating the issuance of these circulars, clearly stated that large number of cases of departmental inquiries are pending and have not attained finality, primarily for the non-availability of the inquiry officers. Even that consideration would tilt the balance, in achieving larger public purpose and interest, rather than to take an approach which would add to the misery of the Railway officials who are facing departmental inquiries. It is a known fact that in most of the inquiries the delinquent is placed either under suspension or faces other adverse consequences.

45. In the present case even the respondents before us have participated in the entire inquiry and received the order of punishment without any protest. They, in fact, have admitted to the established practice of appointment of former railway employees as inquiry officers. The cumulative result of this discussion is that, it is not possible for this Court to hold, in the facts and circumstances of the case, that the "other authority" has to be only a person in service.

Non-furnishing of advise of Central Vigilance Commission and its consequences

46. In its impugned judgment the Tribunal accepted the contention of the respondents that the CVC's advice/note should have been made available to the delinquent during the stage of inquiry. While referring to another judgment of the Tribunal itself, it concluded that the case was akin to the referred judgment and the notes of the CVC should have been furnished and thus set aside the order of punishment. It will be useful to refer to the reason and conclusion recorded by the Tribunal in its order. There are only two paragraphs i.e., Paragraph Nos. 17 and 18 of the Tribunal's judgment which have been recorded in this regard:

> "17. We are of the opinion that this case is akin to the two cases mentioned above as far as the non supply of CVC's advise is concerned.
>
> 18. If the advise of the Central Vigilance Commission has been considered during the course of the disciplinary proceedings, the same should have been supplied to the delinquent official if asked for at appropriate time. In very special cases, such request may not be considered, but in such situations, the competent authority should have recorded the reasons for not supplying such documents."

47. The High Court has really not dealt with this issue in any further elaboration, except affirming the order of the Tribunal. The High Court mainly considered the arguments founded on the interpretation of Rule 9(2). The reasons recorded by the Tribunal are in no way sufficient to sustain that finding. Before setting aside the impugned orders on that ground, the Tribunal should have concluded in relation to certain facts. They be :

(a) Whether there were any CVC notes having a direct bearing on the inquiry in question,

(b) Whether such report was actually brought by the delinquent officer,

(c) Whether such notes were actually taken into consideration by the disciplinary authority while passing the impugned orders and finally,

(d) Whether the delinquent officer has suffered de facto prejudice as a result of non-furnishing of advise.

48. Unfortunately, the findings recorded by the Tribunal are entirely silent on the above material aspects, as is clear from Paragraph Nos. 17 and 18 of its judgment.

49. From the records before us, it appears that the circular issued by the Vigilance Department was actually asked for by the delinquent officer in the application filed before the Tribunal and even in the reply filed before the High Court. It is nowhere stated what was the relevancy of this alleged CVC note, whether it had actually been taken into consideration and, whether it had caused prejudice to the delinquent officer. All these ingredients are not satisfied in the records before us. It is a settled rule of departmental proceedings that, it is for the delinquent officer to specifically raise such an issue and discharge the onus of prejudice. The concept of prejudice, we shall discuss shortly. But for the present, we are only discussing its factual aspect and the law relating thereto.

50. The documents and the circulars issued by the Central Vigilance Commission, Government of India which have been placed on record as Annexure R-3 dated 28th September, 2000 relate to furnishing of information of the CVC advice and the purpose sought to be achieved as well as the need of the employee's representation in that regard. The record is entirely silent as to what were the comments of the CVC and whether they have been taken into consideration by the disciplinary authority or not.

51. Despite the factual aspect of the case, the learned

counsel appearing for the appellants has relied upon the judgment of this Court in the case of *Sunil Kumar Banerjee v. State of West Bengal & Ors.* [1980 (3) SCC 304], contending that it was not necessary and no prejudice had been caused to the respondent because of the alleged non-supply of the Vigilance note. On the contrary, the learned counsel appearing for the respondents has relied upon the judgment of this Court in the case of *State Bank of India & Ors. v. D.C. Aggarwal & Anr.* [1993 (1) SCC 13], to raise a counter plea that any document taken into consideration for imposing a punishment and if the CVC recommendations were prepared at the back of the officer, the order of punishment so passed would be liable to be set aside. The proposition of law stated in the above two judgments can hardly be disputed. What is really required to be seen by the Court is, whether the duty to furnish such a report arises out of a statutory rule or in consonance with the principles of natural justice and whether non-furnishing of such a report has caused any prejudice to the officer concerned.

52. From the aforenoticed facts it is clear that, there is nothing on record to show that the alleged CVC notes have actually been taken into consideration and that the same have affected the mind of the disciplinary authority while considering the defence of the delinquent officer and imposing punishment upon him. Unless such notes were actually considered and had some prejudicial effect to the interest of the delinquent officer, it will not be necessary for the Court to interfere in the departmental inquiry proceedings on that ground. In the case of *Sunil Kumar Banerjee* (supra), where the Vigilance Commissioner had been consulted, there was alleged non-supply of Vigilance Commissioner's report to the officer. A three Judge-Bench of this Court took the view that the findings of the disciplinary authority and its decision was not tainted and, therefore, would not be termed as illegal. The Court in Para 4 of the judgment held as under:

"4. We do not also think that the disciplinary authority

committed any serious or material irregularity in consulting the Vigilance Commissioner, even assuming that it was so done. The conclusion of the disciplinary authority was not based on the advice tendered by the Vigilance Commissioner but was arrived at independently, on the basis of the charges, the relevant material placed before the Inquiry Officer in support of the charges, and the defence of the delinquent officer. In fact the final conclusions of the disciplinary authority on the several charges are so much at variance with the opinion of the Vigilance Commissioner that it is impossible to say that the disciplinary authority's mind was in any manner influenced by the advice tendered by the Vigilance Commissioner. We think that if the disciplinary authority arrived at its own conclusion on the material available to it, its findings and decision cannot be said to be tainted with any illegality merely because the disciplinary authority consulted the Vigilance Commissioner and obtained his views the very same material. One of the submissions of the appellant was that a copy of the report of the Vigilance Commissioner should have been made available to him when he was called upon to show cause why the punishment of reduction in rank should not be imposed upon him. We do not see any justification for the insistent request made by the appellant to the disciplinary authority that the report of the Vigilance Commissioner should be made available to him. In the preliminary findings of the disciplinary authority which were communicated to the appellant there was no reference to the view of the Vigilance Commissioner. The findings which were communicated to the appellant were those of the disciplinary authority and it was wholly unnecessary for the disciplinary authority to furnish the appellant with a copy of the report of the Vigilance Commissioner when the findings communicated to the appellant were those of the disciplinary authority and not of the Vigilance Commissioner. That the preliminary findings of the

disciplinary authority happened to coincide with the views of the Vigilance Commission is neither here nor there."

53. No rule has been brought to our notice where it is a mandatory requirement for the disciplinary authority to consult the vigilance officer and take the said report into consideration before passing any order. If that was the position, the matter would have been different.

54. In the present case, firstly, no such rule has been brought to our notice and secondly, there is nothing on record to show that the alleged notes of the CVC were actually taken into consideration and the same effected or tainted the findings or mind of the authority while passing the orders of punishment. Thus, in our view, the findings of the Tribunal cannot be sustained in law. Unless the Rules so require, advice of the CVC is not binding. The advice tendered by the CVC, is to enable the disciplinary authority to proceed in accordance with law. In absence of any specific rule, that seeking advice and implementing thereof is mandatory, it will not be just and proper to presume that there is prejudice to the concerned officer. Even in the cases where the action is taken without consulting the Vigilance Commission, it necessarily will not vitiate the order of removal passed after inquiry by the departmental authority. Reference in this regard can also be made to the judgment of this Court in the cases of *State of A.P. & Anr. v. Dr. Rahimuddin Kamal* [1997 (3) SCC 505] and *Deokinandan Prasad v. State of Bihar* [1971 (2) SCC 330]. In the case of *Dr. Rahimuddin Kamal* (supra), this Court was concerned with Rule 4(2) of the Andhra Pradesh Civil Services (Disciplinary Proceedings Tribunal) Rules, 1961, where the expression 'shall' had been used in the Rules, making it obligatory upon the part of the Government, which required it to examine the records and after consulting the Head of the Department, pass an appropriate order. But before taking a decision, the Government shall consult the Vigilance Commission. In that case the order of removal from service was passed in accordance with law and after conducting appropriate inquiry but without

consulting the Commission. The Court expressed the view that the expression 'shall' had to be construed as 'may' and non consultation with the Commission would not render the order illegal or ineffective. In view of the larger Bench judgment and particularly, with reference to the facts of the present case, we are unable to accept the contention of the respondents before us.

55. In its letter dated 28th December, 2001, the respondent claimed certain documents during the course of departmental inquiry. In Annexure-1 to this letter, at Sr. No.1, he had prayed for the circular dated 28th September, 2000 from CVC to CVO's of all the Ministries. At Sr. No. 2, he had asked for CVC's first stage advice and Railway's note sent to CVC for arriving at the first stage advice. Thus, both these documents were of a very general nature and in no way suggested that the concerned disciplinary authorities had taken into consideration any particular notes advising action against the said officer. Some element of prejudice is essential before an order of imposing penalty can be interfered with by the Court, particularly when the inquiry otherwise had been conducted in accordance with law and no grievance was raised by the respondent on that behalf except the points raised for consideration of the Tribunal. Thus, we are of the view that no statutory rule or regulation has been violated by the appellant nor any CVC notes were actually taken into consideration for imposing the punishment upon the respondent. Thus, the second argument of the respondent also merits rejection.

Whether the de facto prejudice was a condition precedent for grant of relief and if so, whether respondents had discharged their onus.

56. In the submission of the appellants, there is no violation of any statutory rule or provision of the Act. Departmental inquiry has been conducted in accordance with the Rules and in consonance with the principles of natural justice. The respondents have not suffered any prejudice, much less

prejudice de facto, either on account of retired employees of the railway department being appointed as inquiry officers in terms of the Rule 9(2) of the Rules or in the case of Alok Kumar, because of alleged non furnishing of CVC report. The contention is that the prejudice is a sine qua non for vitiation of any disciplinary order. However, according to the respondents, they have suffered prejudice ipso facto on both these accounts as there are violation of statutory rules as well as the principles of natural justice. In such cases, by virtue of operation of law, prejudice should be presumed and judgment of the Tribunal and the High Court call for no interference.

57. Earlier, in some of the cases, this Court had taken the view that breach of principle of natural justice was in itself a prejudice and no other 'de facto' prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where the Rule is merely dictatory the element of de facto prejudice needs to be pleaded and shown. With the development of law, rigidity in these Rules is somewhat relaxed. The instance of de facto prejudice has been accepted as an essential feature where there is violation of non-mandatory rules or violation of natural justice as it is understood in its common parlance. Taking an instance, in a departmental inquiry where the Department relies upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal documents have resulted in de facto prejudice and he has been put to a disadvantage as a result thereof. Even in the present cases, Rule 9 (2) empowers the disciplinary authority to conduct the inquiry itself or appoint other authority to do so. We have already held that the language of Rule 9(2) does not debar specifically or even by necessary implication appointment of a former employee of the Railways as inquiry officer. Even if, for the sake of

argument, it is assumed otherwise, all the respondents have participated in the departmental inquiries without protest and it is only after the orders of the competent authority have been passed that they have raised this objection before the Courts. In the light of the peculiar facts and circumstances of the present case, it is obligatory upon the respondents to show that they have suffered some serious prejudice because of appointment of retired Railway officers as inquiry officers. We have no hesitation in stating that the respondents have no way satisfied this test of law. Thus, if their argument was to be accepted on the interpretation of Rule 9 (2), which we have specifically objected, even then the inquiries conducted and the order passed thereupon would not be vitiated for this reason.

58. Doctrine of de facto prejudice has been applied both in English as well as in Indian Law. To frustrate the departmental inquiries on a hyper technical approach have not found favour with the Courts in the recent times. In the case of *S.L. Kapoor v. Jagmohan* [1980 (4) SCC 379], a three Judge Bench of this Court while following the principle in *Ridge v. Baldwin* stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in its self prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings. The Court in *S.L. Kapoor* (supra) held as under:

> "**18**. In *Ridge v. Baldwin* [1964 AC 40, 68 : 1963 2 All ER 66, 73] One of the arguments was that even if the appellant have been heard by the Watch Committee nothing that he could have said could have made any difference. The House of Lords observed at (p. 68):
>
> "It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in its own defence before dismissing him this case was so clear that nothing that the appellant could have said could have made any difference. It is at least

very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonably body of men could have reinstated the appellant. But at between the other two courses open to the watch committee the case is not so clear. Certainly, on the facts, as we know them the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they have in the exercise of their discretion decided to take a more lenient course."

59. Expanding this principle further, this Court in the case of *K.L. Tripathi v. State Bank of India* [(1984) 1 SCC 43] held as under:

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

60. In the case of *ECIL v. B. Karunakar* [(1993) 4 SCC 727], this Court noticed the existing law and said that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact, prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons. It will be

useful to refer to the judgment of this Court in the case of *Haryana Financial Corporation v. Kailash Chandra Ahuja* [2008 (9) SCC 31] at page 38 where the Court held as under:

"From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

61. The well established canons controlling the field of bias in service jurisprudence can reasonably extend to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default, which relates statutory violations. It will not be permissible to set aside the departmental inquiries in any of these classes merely on the basis of apprehended prejudice.

62. In the light of the above enunciated rudiments of law, let us revert to the two points argued before us. Firstly, the contention of the respondents that Rule 9 (2) necessarily debars appointment of former railway employees as inquiry officers (other authority) is without any merit. Secondly, they have

suffered no prejudice at least none has brought to our notice from the record before us or even during arguments. The contention was that this being violation of the statutory rule there shall be prejudice ipso facto. We may also notice that the circulars issued by the Department of Railways cannot be ignored in their entirety. They have only furthered the cause contemplated under Rule 9 (2) of the Rules and in terms of judgment of *Virpal Singh Chauhan* (supra) the Court had taken the view that circulars should be read harmoniously and in given circumstances, may even prevail over the executive directions or Rules.

63. We do not find any merit even in the contention that if departmental inquiry has been conducted under the Rules of 1968 in accordance with law, principles of natural justice and no de facto prejudice is pleaded or shown by cogent documentation, the court would be reluctant to set aside the order of punishment on this ground alone. Secondly, the argument in relation to non-furnishing of CVC notes is again without any foundation as it has not even been averred in the application before the Tribunal, that these alleged notes were part of the record and that they were actually considered by the Disciplinary Authority and such consideration had influenced the mind of the competent authority while passing the impugned orders. Absence of pleading of these essential features read with the fact that no such documentation has been placed on record except demanding circulars of the CVC, we are of the considered view that even on this account no prejudice, as a matter of fact, has been caused to the delinquent officers (in the case of Shri Alok Kumar). We are not able to accept the contention addressed on behalf of the respondents that it is not necessary at all to show de facto prejudice in the facts of the present cases. We may notice that the respondents relied upon the judgment of this Court in the case of *ECIL* (supra), that imposition of punishment by the Disciplinary Authority without furnishing the material to the respondents was liable to be quashed, as it introduced unfairness and violated sense of right

and liberty of the delinquent in that case. No doubt in some judgments the Court has taken this view but that is primarily on the peculiar facts in those cases where prejudice was caused to the delinquent. Otherwise right from the case of *S.L. Kapoor* (supra), a three Judge Bench of this Court and even the most recent judgment as referred by us in *Kailash Chandra Ahuja's* case (supra) has taken the view that de facto prejudice is one of the essential ingredients to be shown by the delinquent officer before an order of punishment can be set aside, of course, depending upon the facts and circumstances of a given case. *Judicia posteriora sunt in lege fortiori.* In the later judgment the view of this Court on this principle has been consistent and we see no reason to take any different view. Prejudice normally would be a matter of fact and a fact must be pleaded and shown by cogent documentation to be true. Once this basic feature lacks, the appellant may not be able to persuade the Court to interfere with the departmental inquiry or set aside the orders of punishment.

64. The judgment of the Tribunal and the High Court in our view are contrary to the settled principles of law and thus cannot be sustained, therefore, we set aside the judgment of the Tribunal as well as the High Court in all these cases. The appeals are allowed. However, in the facts and circumstances of the case we leave the parties to bear their own costs.

K.K.T. Appeals allowed.

SHAMIMA KAUSER
v.
UNION OF INDIA AND ORS.
(Criminal Appeal No. 818 of 2010)

APRIL 19, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Constitution of India, 1950 – Art. 136 – Interference with ad-interim order passed by High Court – Scope – Deaths in alleged encounters staged by Gujarat police – Writ petition seeking investigation by CBI – High Court passed order for constituting an Investigation Team – Meanwhile, Metropolitan Magistrate made inquiry u/s. 176 CrPC and submitted report whereunder the alleged encounters were found to be fake – Police officials indicted in the report – Application filed by State Government in the writ petition, with prayer to set aside the report of the Magistrate – Operation of the report stayed by High Court, with further direction to the Registrar General of the High Court to make detailed inquiry into the matter which led to holding of inquiry by the Magistrate u/s. 176, CrPC – On appeal, held: Order passed by High Court was ad-interim in its nature – Such ad-interim order not to be interfered with under Art.136 – Interest of justice would be met if the main writ Petition itself is heard and disposed of by High Court alongwith the application filed by State Government – Meanwhile, Investigating Team already constituted by the High Court not to deal with the report of Magistrate in any manner whatsoever – Directions of High Court to Registrar General (of the High Court) to make detailed inquiry into the matter set aside – Code of Criminal Procedure, 1973 – s.176 – Interim order.

Some persons died in alleged encounters by the

Gujarat police. Appellants, i.e. the parents of the deceased, filed writ petition seeking investigation into the deaths, by CBI. The High Court passed order for constituting an Investigation Team. Meanwhile, the Metropolitan Magistrate made inquiry u/s. 176 CrPC pursuant to orders of the Chief Metropolitan Magistrate and submitted report whereunder the alleged encounters were found to be fake. Police officials were indicted in the said report.

The State Government filed application in the writ petition, with prayer to set aside the report of the Magistrate. The operation of the report was stayed by High Court, with further direction to the Registrar General of the High Court to make detailed inquiry into the matter which led to holding of inquiry by the Magistrate under Section 176, CrPC. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1. The order passed by the High Court is ad-interim in its nature granting stay of the operation of the report (submitted by the Magistrate) as at present. The High Court had not yet finally disposed of the Criminal Miscellaneous Application filed by the State of Gujarat. The effect of the order passed by the High Court is that the operation of the report is kept in abeyance and therefore no further action based on the said report could be initiated in whatsoever manner. In that view of the matter, such ad-interim order is not to be interfered with by this Court, in exercise of its jurisdiction under Article 136 of the Constitution of India. [Para 10] [95-A-D]

2. Interest of justice would be met if the main Writ Petition (Special Criminal application) itself is heard and disposed of alongwith the Criminal Miscellaneous Application filed by the State of Gujarat. In the meanwhile,

the Investigating Team already constituted by the High Court shall not deal with the report of the Magistrate in any manner whatsoever. The directions issued to the Registrar General (of the High Court) to make a detailed inquiry into the matter which led to holding of inquiry by the Magistrate under Section 176, CrPC is also set aside. [Para 10] [95-D-G]

3. The High Court is required to adjudicate the Writ petition (Special Criminal Application) on its own merits and shall consider the very maintainability of the Criminal Miscellaneous Application filed by the State of Gujarat. [Para 11] [96-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 818 of 2010.

From the Judgment & Order dated 9.9.2009 of the High Court of Gujarat at Ahmedabad in Misc. Criminal Application No. 10625 of 2009 in Special Criminal Application No. 822 of 2004.

WITH

Crl. A. No. 819 of 2010.

Kamini Jaiswal, Vrinda Grover, Shomona Khanna, Rebecca M. John, Divyesh Pratap Singh, Huzefa Ahmadi, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Taruna Singh, Charu Mathur for the Appellant.

H.P. Rawal, ASG, Harish N. Salve, Tushar Mehta, AAG, Hemantika Wahi, Pinky, Somanath Padhan, P.K. Dey, Rohit Sharma, S.N. Terdol, Gopal Jain, Nitin Mishra for the Respondents.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Crl.M.P.No.19538/2009

for permission to file Special Leave Petition is allowed.

2. Leave granted in both the appeals.

3. These appeals are being disposed of by a common order since the same impugned order dated 09.09.2009 made in MCRLA No. 10625/2009 in SCRLA No.822/2004 of the High Court of Gujarat is under challenge in both the appeals. The High Court by the impugned order granted stay of the report submitted by the learned Metropolitan Magistrate dated 07.09.2009 in Crime No.8/2004 registered with DCB Police Station, Ahmedabad. The impugned order is challenged by the appellants on various grounds. In order to consider the same it may be just and necessary to notice few relevant facts:

4. The appellant in Criminal Appeal @ S.L.P.(Crl.)No.7305/2009 is the mother of the deceased Israt Jehan who is alleged to have been killed by the Gujarat Police in an alleged encounter dated 15.06.2004. The appellant in Criminal Appeal @ Crl. M. P. No. 19538/2009 is the father of the deceased Javed Gulam Mohammed Sheikh @ Pranesh Kumar Pillai who is also alleged to have been killed by the Gujarat Police in a fake encounter. The appellants have been moving from pillar to post seeking justice and a proper inquiry into the matter. They have been consistently asserting before all the authorities that their children were the victims of a fake encounter staged in the year 2004 by the officers of the Gujarat Police. The appellant Shamima Kauser filed a Writ Petition under Article 226 of the Constitution of India, being Special Criminal Application No.822/2004, before the High Court of Ahmedabad, seeking an investigation into the death of her daughter, by the Central Bureau of Investigation, for the reason that she firmly believed that her daughter had been wrongfully done to death by the Gujarat Police in a fake encounter. The appellant in the other appeal filed Writ Petition in this court seeking appropriate directions to order investigation by the Central Bureau of Investigation into the “fake encounter killing” of his son Javed Gulam Mohammed Sheikh @ Pranesh Kumar

Pillai. The said Writ Petition was disposed of by this court granting liberty to the petitioner to approach the High Court of Gujarat seeking appropriate remedy since a Writ Petition arising out of a similar incident was already pending before the High Court.

5. On 07.08.2009 a leaned Single Judge of the High Court passed an order adjourning the Special Criminal Application No. 822/2004 filed by Shamima Kauser to explore the possibility of handing over the investigation to higher officer/s from the cadre of Additional Director General of Police. The material portion of the order reads as under:

> "With a view to explore the possibility of handing over the investigation to higher officer/s. i.e. officer/s above the tank of Deputy Commissioner of Police, more particularly, from the cadre of Additional D.G., matter is adjourned to 12.08.2009. To be taken up at 1630 hours."

6. On 13.08.2009, the learned Single Judge having considered the list of police officers produced by the State of Gujarat passed a detailed order constituting a Team of Investigation "for the purpose of carrying out the investigation." A team of three senior most officers was constituted for the aforesaid purpose. The High Court also granted permission to Shamima Kauser to make suggestions to the Investigating Team with regard to areas of investigation and to inspect the record qua the FSL report and the ballistic report. The High Court further directed the Investigating Team to consider all the aspects from every angle relevant for the purpose of finding out whether the incident was a genuine encounter or a fake one. The report was directed to be placed before the court on the next date of hearing. The appellant promptly submitted an application before the Investigating Team for inspection of documents and a further application suggesting some areas of investigation.

7. On 07.09.2009, the Metropolitan Magistrate, Court

No.1, Ahmedabad, having made an inquiry under Section 176 of the Criminal Procedure Code pursuant to the orders dated 12.08.2009 of the Chief Metropolitan Magistrate submitted an Inquiry Report in respect of death of (1) Israt Jehan, (2) Jishan Johar, (3) Amjad Ali Akbar Ali Rana@ Salim @ Raj Kumar and (4) Javed Ghulam Sheikh. The learned Magistrate having made a detailed analysis of the material available on record found that they were killed by "the ——— police officers and police personnel with their service revolver and unlicenced and illegally held AK-56 rifle and with other weapons fired bullets on body of deceased and thereby murdered —— in a systemic manner, cold-bloodedly, mercilessly and cruelly."

8. On 09.09.2009, the State of Gujarat and as well as two police officers whose names were mentioned in the report filed Miscellaneous Applications in Special Criminal Application No.822/2004 with a prayer to set aside the report dated 07.09.2009 of the learned Magistrate whereunder the alleged encounters were found to be fake. The matter was orally mentioned for listing and they were taken up on the same day at about 4.30 p.m. by the learned Single Judge and disposed of by the impugned order. However, the Criminal Miscellaneous Applications filed by the individual police officers were withdrawn and only Miscellaneous Criminal Application No. 10625/2009 filed by the State of Gujarat was heard and disposed of.

9. The learned counsel for the appellant – Ms. Kaimini Jaiswal, and Mr. Huzefa Ahmadi appearing on behalf of the appellant in the other appeal expressed their serious objection to the manner in which the learned Single Judge took up the application filed by the State of Gujarat and granted stay of the report with a further direction to the Registrar General to make a detailed inquiry into the matter which led to holding a parallel inquiry and filing of the report by the learned Magistrate. The learned Judge was of the opinion that the inquiry made by the learned Magistrate was beyond "the provision of law." It was

strenuously contended the very Miscellaneous Application filed by the State of Gujarat in the Writ Petition filed by one of the appellants herein was not maintainable.

10. Notwithstanding various observations made by the Learned Single Judge in the impugned order the fact remains the order passed by the learned Single Jude is ad-interim in its nature granting stay of the operation of the report as at present. The learned Single Judge not yet finally disposed of the Criminal Miscellaneous Application filed by the State of Gujarat. The effect of the order passed by the learned Single Judge is that the operation of the report is kept in abeyance and therefore no further action based on the said report could be initiated in whatsoever manner. In such view of the matter we are not inclined to interfere with such ad-interim order in exercise of our jurisdiction under Article 136 of the Constitution of India. Interest of justice would be met if the main Writ Petition itself is heard and disposed of alongwith the Criminal Miscellaneous Application filed by the State of Gujarat. In the meanwhile, the Investigating Team already constituted by the High Court shall not deal with the report of the learned Magistrate in any manner whatsoever. However, the observations made in the impugned order with regard to the report of the learned Magistrate are set aside which are totally unnecessary. The observations so made if allowed to remain may result in far reaching consequences. We fail to appreciate as to why and what made the learned Judge to make such observations even while the very application filed by the State is kept pending for its adjudication. The directions issued to the Registrar General to make a detailed inquiry into the matter which led to holding of inquiry by the Magistrate under Section 176 of the Code of Criminal Procedure is also set aside.

11. We must express our reservations the manner in which the proceedings went on before the High Court resulting in the impugned order. In the circumstances we consider it appropriate to request the learned Chief Justice of the High

Court to place Special Miscellaneous Application No.822/2004 along with Criminal Miscellaneous Applications including Criminal Miscellaneous Application No. 10625/2009 filed by the State of Gujarat for their disposal in accordance with law as expeditiously as possible preferably within six months from today. It is needless to observe that the observations made in the impugned order shall have no bearing whatsoever upon the merits of the case. The Division Bench is required to adjudicate the Special Criminal Application on its own merits uninfluenced by the previous order passed by the learned Single Judge in the matter. It is also needless to observe that the Division Bench shall consider the very maintainability of the Criminal Miscellaneous Application filed by the State of Gujarat.

12. Impleadment Application in Criminal Appeal @ S.L.P.(Crl.)No.7305/2009 : In view of the final orders passed in the Criminal Appeals no further order is required to be passed in this application. The application shall accordingly stand dismissed with liberty granted to the applicant to avail such remedies as may be available in law.

13. The appeals are accordingly disposed of.

B.B.B. Appeals disposed of.

GENERAL INSURANCE COUNCIL AND ORS.
v.
STATE OF ANDHRA PRADESH AND ORS.
(Writ Petition (C) No. 14 of 2008)

APRIL 19, 2010

[P. SATHASIVAM AND DEEPAK VERMA, JJ.]

Code of Criminal Procedure, 1973 – ss.451 and 457 – Directions issued by Supreme Court in two earlier cases with regard to disposal of seized vehicles involved in commission of various offences – Petition under Art. 32 of the Constitution alleging non-compliance of such directions – Considering the mandate of s.451 r/w s.457, further directions now issued by Supreme Court – In addition, all State Governments/Union Territories/ Director Generals of Police directed to ensure macro implementation of the statutory provisions – Activities of each and every police station, especially with regard to disposal of seized vehicles, directed to be taken care of by the Inspector General of Police of the concerned Division/ Commissioner of Police of the concerned cities/ Superintendent of Police of the concerned district – On non-compliance of the directions, action to be taken against the erring officials – Motor Vehicles Act, 1988 – s.158(6) – Central Motor Vehicle Rules, 1989 – r.159 – Constitution of India, 1950 – Article 32.

In two earlier cases, viz. *Sunderbhai Ambalal Desai's case** and *General Insurance Council's case***, **the Supreme Court had issued certain directions with regard to disposal of seized vehicles involved in the commission of various offences.**

A writ petition under Article 32 of the Constitution was filed wherein it was contended that the police, the investigating agency and the prosecuting agency were

not taking appropriate and adequate steps for compliance of the directions issued by this Court in the aforesaid two cases. Prayer was made for further directions, orders and clarifications, so that national waste with regard to the seized vehicles may not become junk and their road worthiness be maintained.

Disposing of the writ petition, the Court

HELD: 1.1. The information with regard to all insured vehicles in the country is available with the Insurance Information Bureau created by IRDA. This information could be utilised to assist the police to identify the insurer of the vehicle. Upon recovery of the vehicle in police station, insurer/complainant can call an All India Toll Free No. to be provided by Insurance Information Bureau to give the information of the recovered vehicle. Thereafter, the insured vehicle database would be searched to identify the respective insurer. Upon such identification, this information can be communicated to the respective insurer and concerned police stations for necessary coordination. The information is required to be utilised and followed scrupulously and has to be given positively as and when asked for by the Insurer. Also it is necessary that in addition to the directions issued by this Court in *Sunderbhai Ambalal Desai's case,* considering the mandate of Section 451 read with Section 457 of the CrPC, the following further directions with regard to seized vehicles are required to be given.

"(A) Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the Jurisdictional Court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release. (B) The

photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with. Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the rightful ownership of the vehicle does not vest with the insurer. The undertaking/guarantee would be furnished at the time of release of the vehicle, pursuant to the application for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer." [Paras 13, 14] [105-H; 106-A-H; 107-A-B]

1.2. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only they occupy substantial space of the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its road worthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, all the State Governments/ Union Territories/Director Generals of Police are directed to ensure macro implementation of the statutory provisions. It is further directed that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the concerned Division/Commissioner of Police of the concerned cities/Superintendent of Police of the concerned district. In case any non-compliance is

reported either by the Petitioners or by any of the aggrieved party, then a serious view of the matter would be taken against an erring officer, who would be dealt with iron hands. [Paras 15, 16] [107-B-G]

* *Sunderbhai Ambalal Desai v. State of Gujarat,* **(2002) 10 SCC 283 and** ** *General Insurance Council and Others v. State of Andhra Pradesh,* **2007 (8) SCR 192, referred to.**

Case Law Reference:

(2002) 10 SCC 283	**referred to**	**Para 1**
2007(8) SCR 192	**referred to**	**Para 8**

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 14 of 2008.

Under Article 32 of the Constitution of India.

G.E. Vahanvati, AG, Mohan Jain, ASG, Jayshree Anand, AAG, K. Ramamurthi, A. Mariarputham, Joy Basu, B.K. Satijia, D.K. Thakur, S. Wasim A. Qadri, Anil Katiyar, Asha G. Nair, Rohini Mukherjee, Sadhana Sandhu, D.S. Mahra, Madhurendra Kumar, Bikas K. Gupta, Avijit Bhattacharjee, Gopal Jain, Nitin Mishra, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Sanjay R. Hegde, A. Rohen Singh, Ramesh Kr. Mishra, Sibo Sankar Mishra, Kamal Mohan Gupta, M.K. Michael, P.V. Yogeswaran, Gopal Singh, Rituraj Biswas, Noorjahan, K.K. Mahalik, Abhishek Vikas, T. Mahipal, Ram Naresh Yadav, Aruneshwar Gupta, S.S. Shamshery, P.N. Gupta, T. Harish Kumar, Prasanth P., Aruna Mathur, Amarjeet Singh Girsa, Arputham Aruna & Co., Anuradha Rustagi, D. Bharathi Reddy, Edward Belho, Enatoli Sema, Anil Shrivastav, Rituraj, Vikas Upadhyay, B.S. Banthia, M. Shoeb Alam, T.V. George, Navneet Kumar, Keshav, Corporate Law Group, B.B. Singh, H.K. Puri, Priya Puri, V.M. Chauhan, S.K. Puri, Naresh K. Sharma, Shailendra Swarup P.V. Dinesh, T.P. Sindhu, P.V. Vinod, P. Rajesh, Athouba Khaidem, H.B. Manar, Manish Kumar, V.G.

Pragasam, S.J. Aristotle, Prabu Rama Subramanian, Khwairakpam Nobin Singh, Ansar Ahmad Chaudhary, Dharmendra Kumar Sinha, Ajay Pal for the appearing parties.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Even though the question projected in this petition filed under Article 32 of the Constitution of India stands answered by a judgment of two learned judges of this Court reported in (2002) 10 SCC 283 titled *Sunderbhai Ambalal Desai Versus State of Gujarat* pertaining to interpretation and mode of implementation of Sections 451 and 457 of the Code of Criminal Procedure, 1973 (hereinafter shall be referred to as 'the Code'), but on account of certain grey areas having been left untouched, which still cast clouds on the question, this petition has been filed for further directions, orders and clarifications.

2. Petitioner No.1, General Insurance Council has been constituted under Section 64 C (b) of the Insurance Act, 1938 consisting of all the members and associate members of the association as envisaged in Section 64A of the said Act, who carry on general insurance business in India and are being represented by Petitioner No. 1 and have been arrayed as Petitioner Nos. 2 to 5 in the said petition.

3. According to them, there has been a gross violation of fundamental rights as conferred on them under Articles 14 and 19 of the Constitution of India. Thus, they are constrained to approach this Court directly by filing a petition under Article 32 of the Constitution of India. They further contended that despite the directions passed by this Court in Sunderbhai Ambalal Desai (supra), as also in W.P. (C) No. 282 of 2007 titled *General Insurance Council and Others Vs. State of Andhra Pradesh and Others,* decided on 09.07.2007, there has not been full and complete compliance of the same. Therefore, they have once again approached this Court for issuing further directions so that national waste with regard to the seized

vehicles involved in commission of various offences may not become junk and their road worthiness be maintained.

4. According to the Petitioners, the report of 2005 of NCRB, 84,675 vehicles were reported lost, out of which 24,918 vehicles were recovered by the police and out of these, only 4,676 vehicles were finally co-ordinated. As a result, several hundred crores worth of assets were lost. Further, by the time the recovered vehicles are released, the same are reduced to junk at the respective police stations. In other words, Petitioners have prayed that national waste that is being caused could be substantially reduced, curbed and eliminated to a great extent. Keeping in view the aforesaid facts in mind, they have filed this Writ Petition.

5. In Sunderbhai Ambalal Desai (supra), the Supreme Court was primarily dealing with provisions of Sections 451 and 457 of the Code. While quoting the aforesaid two provisions of the Act in the judgment, it was observed in para 7 as under:

> "7. In our view, the powers under Section 451 Cr PC should be exercised expeditiously and judiciously. It would serve various purposes, namely:
>
> 1. owner of the article would not suffer because of its remaining unused or by its misappropriation;
>
> 2. court or the police would not be required to keep the article in safe custody;
>
> 3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."

6. To safeguard the interests of the prosecution, it was directed that following measures should be adopted giving instances contained in para 12 reproduced hereinbelow:

"12 For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft,robbery or dacoity has taken place, then seized articles behanded over to the complainant after:

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security."

7. While dealing with the seized vehicles from time to time by the police either in commission of various offences or abandoned vehicles or vehicles which are recovered during investigation of complaint of thefts, the court observed as under:-

"17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

8. Since it appeared to the Petitioners that despite the said directions, the requirements of the Petitioners were not being fulfilled, they were constrained to file W.P (C) No. 282 of 2007 titled *General Insurance Council and Others Vs. State of Andhra Pradesh and Others,* decided on 09.07.2007 by a coordinate Bench of two learned Judges of this Court.

9. In this second round of litigation before this Court, a direction was sought with regard to compliance of Section 158 (6) of the Motor Vehicles Act, 1988 in short 'the M.V. Act' and Rule 159 of the Central Motor Vehicles Rules, 1989 in short, 'the Rules'.

10. This Court in the said matter after considering the issue came to the following conclusion:-

"Since there is a mandatory requirement to act in the manner provided in Section 158 (6) there is no justifiable reason as to why the requirement is not being followed.

It is, therefore, directed that all the State Governments and the Union Territories shall instruct, if not

already done, all concerned police officers about the need to comply with the requirement of Section 158 (6) keeping in view the requirement indicated in Rule 159 and in Form 54. Periodical checking shall be done by the Inspector General of Police concerned to ensure that the requirements are being complied with. In case there is non-compliance, appropriate action shall be taken against the erring officials. The Department of Transport and Highway shall make periodical verification to ensure that action is being taken and in case of any deviation immediately bring the same to the notice of the concerned State Government/Union Territories so that necessary action can be taken against the concerned officials."

The writ petition is accordingly disposed of."

11. Despite the aforesaid directions having been issued by this Court in the aforesaid two matters, grievance is still being made by the Petitioners, that the police, investigating agency and the prosecuting agency are not taking appropriate and adequate steps for compliance of aforesaid directions issued by this Court. Therefore, a need has arisen for giving further directions so as to clear the clouds and iron out the creases.

12. Notice of the said petition was issued to all the States and Union Territories. Almost all the States have contended that they have already issued necessary guidelines and directions for full and complete compliance of the provisions contained in Sections 451 and 457 of the Code as elaborated in Sunderbhai Ambalal Desai (supra) as also under Section 158 (6) of the M.V. Act and 159 of the Rules as directed in *General Insurance Council* case (supra). Thus, in one voice, they have contended that there would not be any difficulty in compliance of the directions that may be issued in furtherance of achieving the object as directed by this Court. Thus, in our view, there appears to be consensus in this matter.

13. Petitioners have submitted that information with regard

to all insured vehicles in the country is available with the Insurance Information Bureau created by IRDA. This information could be utilised to assist the police to identify the insurer of the vehicle. Upon recovery of the vehicle in police station, insurer/ complainant can call an All India Toll Free No. to be provided by Insurance Information Bureau to give the information of the recovered vehicle. Thereafter, the insured vehicle database would be searched to identify the respective insurer. Upon such identification, this information can be communicated to the respective insurer and concerned police stations for necessary coordination.

14. In our considered opinion, the aforesaid information is required to be utilised and followed scrupulously and has to be given positively as and when asked for by the Insurer. We also feel, it is necessary that in addition to the directions issued by this Court in *Sunderbhai Ambalal Desai* (supra) considering the mandate of Section 451 read with Section 457 of the Code, the following further directions with regard to seized vehicles are required to be given.

"(A) Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the Jurisdictional Court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release.

(B) The photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with.

(C) Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the

rightful ownership of the vehicle does not vest with the insurer. The undertaking/guarantee would be furnished at the time of release of the vehicle, pursuant to the applcation for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer."

15. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only they occupy substantial space of the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its road worthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/ Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the concerned Division/Commissioner of Police of the concerned cities/Superintendent of Police of the concerned district.

16. In case any non-compliance is reported either by the Petitioners or by any of the aggrieved party, then needless to say, we would be constrained to take a serious view of the matter against an erring officer who would be dealt with iron hands. With the aforesaid directions, this writ petition stands finally disposed of.

B.B.B. Writ Petition disposed of.

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

v.

HINDALCO INDUSTRIES LTD. & ORS.

(Civil Appeal No. 805 of 2008)

APRIL 22, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Electricity Act, 2003 – Wheeling charges for a particular period – Challenged in appeal – During the period, not a single unit of energy was wheeled – Maintainability of the appeal questioned – Tribunal without considering the issue of maintainability, decided the appeal on merit – Held: Issue regarding maintainability needed consideration – Matter remitted to the Tribunal for consideration of all the issues afresh.

Respondent No. 1 challenged the determination of wheeling charges for the year 2005-2006. Tribunal for Electricity directed the appellants to re-determine the wheeling charges. Hence the present appeals.

Allowing the appeals and remitting the matter to the Tribunal, the Court

HELD: The Tribunal has failed to consider the objection raised by the appellants with regard to the maintainability of the appeal filed by respondent No.1, before the Tribunal. Respondent No.1 has sought to challenge the wheeling charges for the year 2005-06. During the year 2005-06 not a single unit of energy was wheeled by respondent No.1 and therefore no wheeling charges were paid/payable. Therefore, the appeal filed by respondent No.1 was at best of an academic interest

only, as at the relevant point of time when the appeal was filed before the Tribunal, the wheeling charges for the year 2006-07 had already been determined. It was also mentioned that the wheeling charges for 2006 were not challenged in the appeal before the Tribunal. In any event, since respondent No.1 had not wheeled any power during the period 2005-06, it did not have to pay any wheeling charges in the first place. Thus, the appeal ought to have been dismissed as having become infructuous. The maintainability of the appeal was an important issue which needed consideration by the Tribunal. It would be in the interest of justice to remand the matter back to the Tribunal for fresh consideration of all the issues after taking into consideration the factual and legal submissions made by the appellant. [Paras 10, 11 and 12] [114-F-H; 115-A, C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 805 of 2008.

From the Judgment & Order dated 31.3.2007 of the Learned Appellate Tribunal for Electricity in Appeal No. 3 of 2007.

WITH

C.A. No. 3341 of 2008.

Shanti Bhushan, Pratik Dhar, C.K. Rai, Malini Poduvai, Sanjeev Kapoor, Avinash Menon (for Khaitan & Co.) for the Appellant.

S. Ganesh, R.K. Sanghi, Dimple Murria, Shivani Sanghi, Anil Kumar Tandale for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. In these two appeals the appellants are aggrieved by the order passed by the

Appellate Tribunal for Electricity (hereinafter referred to as 'the Tribunal') in Appeal No.3/2007 dated October 31, 2007. The present Appeal No. 805 of 2008 is at the instance of West Bengal Electricity Regulatory Commission (hereinafter referred to as 'the Commission'). Appeal No.3341/2008 has been filed by the Calcutta Electricity and Supply Company Limited (hereinafter referred to as 'CESC').

2. We propose to decide the two appeals by this common judgment as they arise out of the aforesaid common order passed by the Tribunal.

3. The controversy between the parties revolves around the methodology, criteria/formula that has to be applied in determining the wheeling charges in accordance with the applicable Rregulations framed under the Electricity Act 2003.

4. We may notice here the skeletal facts which are necessary for the purpose of disposal of these two appeals. HINDALCO Industries Limited, formerly known as Indian Aluminum Company Limited (hereinafter referred to as respondent No.1) has an aluminum and copper products factory at Belurmath in West Bengal within the distribution licence area of CESC. It had an existing Contract Demand Agreement for 8.5 MW with CESC drawing power at the voltage of 33 KV through dedicated lines from the Belurmath receiving Sub-Station of CESC. For this purpose, respondent No.1 has installed a 33 KV Sub-Station at its premises. It has a captive power plant at Hirakud, Orissa. On 31.10.2003 respondents filed an application under Section 9 and 42 of the Electricity Act, 2003 before the Commission seeking permission for open access to wheel surplus captive power of an approximately 9 MW from its power plant to its Belur factory. The distance between the captive power plant at Hirakud, Orissa and Belurmath plant in West Bengal is about 555 kilometers, out of which 550 kilometers falls within the jurisdiction of West Bengal State Electricity Board (for short WBSEB), OPTCL and Eastern Region. We may also notice here that out of these five

kilometers, respondent No.1 had at its own cost put up 2 kilometers long dedicated transmission line, thus using only 3 kilometers of the CESC network. Respondent No.1 paid wheeling charges for transmission of power at the rate of 9.57 paise per unit for 550 kilometers. However, in respect of remaining five kilometers, which also fall within the State of West Bengal, respondent No.1 has to pay wheeling charges at the rate of 83.54 paise/kWh as fixed by the Appellate Commission by its order dated 21.11.2005. In its order dated 21.11.2005 the Commission had observed as follows:

> "26.0. Thereafter, actual of working of open access should follow, naturally depending-upon availability of capacity as laid down in the Regulations on open access. Payments of various charges / fees should follow the provisions of the Regulations dealing with fees, charges and formats. There are still two items on which specific orders from the Commission will be required. The first one concerns the quantum / rate of additional surcharge, while the second one concerns the wheeling charge which will have to be determined by the Commission in terms of Regulation 14.3(b) and Regulation 14.5(b) respectively of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005. We have since determined the wheeling charges applicable to CESC Limited for the year 2005-06 based on factors like distribution network cost, units saleable by the distribution licensee to its consumers, units to be wheeled by the open access customer etc. and the same has worked out to 83.54 paise per kWh. This will be revised appropriately, needless to add, by the Commission every year."

5. Aggrieved by the aforesaid order, respondent No.1 challenged the same before the Tribunal by way of an appeal being Appeal No.1/2006. The aforesaid appeal was allowed by the Tribunal by its order dated 11.7.2006. The impugned order of the Commission was quashed and set aside. The

matter was remanded back to the Commission for a fresh determination of wheeling charges with the following observations:

> "35. It follows that in calculating wheeling charges for the distribution system or associated facilities are to be assessed on applicable distribution network cost, units saleable and units wheeled by all open access customers in the network. The learned counsel for appellant contends that as per CERC (Open Access in Inter-State Transmission) Regulations and WBERC (Terms & Conditions for Open Access –Schedule of Charges, Fees & Formats for Open Access) Regulation, the wheeling charges of the Distributing system should be 0.25 time for short term open access. However, we find from Para 26.0 of the order appealed against, there is no detailed discussion in this respect except holding that 83.54 paisa/ kWh shall be the wheeling charges. No particulars been disclosed is the main grievance and Regulations governing wheeling charges have not been applied correctly. The second respondent has stated in its submission that the WBERC determined the wheeling charges in case of WBSEB for 2005-06 at the rate of 56 paisa/kWh and a copy also was filed. In the circumstances with respect to fixation of wheeling charges the matter deserves to be remitted back to WBERC for fresh consideration in the light of the relevant Rules and affording opportunity to appellant. The authority shall take note of the fact that open access within the Distribution area of CESC is applied to a distance of 5 KM and out of 5 KM, 2 KM distance is appellant's dedicated transmission line put up at its costs."

6. Upon remand, the matter was again heard, and decided by the Commission vide order dated 16.11.2006. By this order the Commission sought to demonstrate and detail the methodology for determining the wheeling charges payable by

respondent No.1. The wheeling charges were re-determined by the Commission at 83.54 paisa per KWH. Again being aggrieved by the aforesaid order, respondent No.1 impugned the same before the Tribunal by way of Appeal No.3/2007.

7. We may notice here that in both the matters before the Tribunal, respondent No.1 had challenged the determination of wheeling charges for the year 2005-06. Initially, respondent No.1 had challenged the order passed by the Commission on 21.11.2005 in Appeal No.1/2006. By order dated 11.7.2006 Appeal No.1/2006 was allowed and the matter was remanded back to the Commission for fresh determination of wheeling charges. It was observed that there was no detailed discussion in the order which would throw light upon the manner and methodology behind determination of wheeling charges. The grievance made by respondent No.1 which was noticed by the Tribunal was that "no particular wheel disclosed is the main grievance and regulation governing wheeling charges have not been applied correctly."

8. Taking note of the aforesaid observations, the Commission re-determined the wheeling charges. It is the case of the appellants herein that wheeling charges had been correctly re-determined on the basis of the total distribution network cost as mandated under the Commission (Terms and Conditions for Open Access –Schedule of Charges, Fees & Formats for Open Access) Regulations, 2005; the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 as well as the West Bengal Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2005.

9. It is claimed by the appellants that the formula/ methodology/criteria for determining wheeling charges has to be in terms of form 1.27 attached to the Tariff Regulations, 2005. In spite of the clear and categorical statutory provisions contained in the applicable regulations, the appellants have been wrongly directed by the Tribunal to re-determine the

wheeling charges on the basis of applicable network of 33 KVW distribution system on which the electricity is being rolled by respondent No.1. The appellants had laid considerable emphasis on the submissions that the determination of wheeling charges based on the interpretation directed by the Tribunal would be *ex facie* contrary to the scheme contemplated under the applicable regulations framed under the Electricity Act, 2003 governing determination of wheeling charges. A combined reading of all the applicable regulations, according to the appellants, leads to the irresistible conclusion that for determining wheeling charges total distribution cost of the network and not the voltage-wise cost would be the determining factor. The interpretation made by the Tribunal, if accepted, would render the regulation framed by the appellant otiose. The Tribunal incorrectly understood and interpreted the expressions applicable distribution network as the distribution network cost which is to be determined at the relevant voltage level.

10. At this stage we need not decide any of the issues raised by the appellants as, in our opinion, the appeals have to be allowed on the short ground that the Tribunal has failed to consider the objection raised by the appellants with regard to the maintainability of the appeal filed by respondent No.1, before the Tribunal.

11. Both the appellants had categorically stated before the Tribunal that respondent No.1 has sought to challenge the wheeling charges for the year 2005-06 as determined by the Tribunal in the order dated 16.11.2006. During the year 2005-06 not a single unit of energy was wheeled by respondent No.1 and therefore no wheeling charges were paid/payable. Therefore, the appeal filed by respondent No.1 herein was at best of an academic interest only, as at the relevant point of time when Appeal No.03/2007 was filed the wheeling charges for the year 2006-07 had already been determined. It was also mentioned that for reasons best known to respondent No.1 herein the wheeling charges for 2006 were not challenged in

the appeal before the Tribunal. In any event since respondent No.1 had not wheeled any power during the period 2005-06, it did not have to pay any wheeling charges in the first place. Thus, the appeal ought to have been dismissed as having become infructuous. It is emphasised by the counsel for the appellant that detailed written notes were submitted before the Tribunal during the course of hearing in Appeal No.3/2007. Thereafter also written submissions were filed detailing the scope of the issues before the Tribunal. Copies of these written submissions have been placed before us as an annexure to the grounds of appeal.

12. The specific submission made by the appellant with regard to the maintainability of the appeal was an important issue which needed consideration by the Tribunal. Numerous issues, which have been raised in these appeals on merits, were also raised before the Tribunal which seem to have escaped the notice of the Tribunal rendering its decision vulnerable. In our opinion, it would be in the interest of justice to remand the matter back to the Tribunal for fresh consideration of all the issues after taking into consideration the factual and legal submissions made by the appellant. In view of the above both the appeals succeed and are allowed. The order passed by the Tribunal is set aside. The appeals are remanded back to the Tribunal to be decided afresh on merits, in accordance with law preferably within a period of three months of the receipt of a certified copy of this order.

13. Appeals are allowed as indicated above with no order as to costs.

K.K.T. Appeals allowed.

RAVINDER KUMAR

v.

STATE OF HARYANA AND ORS.

(Civil Appeal No. 3127 of 2008)

APRIL 22, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

Service Law – Selection – Haryana Police – Post of Constable – Vacancies in general category as well as reserved categories – Reserved category for ex-servicemen(ESM) comprising of three distinct sub categories, ESM (General Category), ESM BC(A) and ESM BC(B) category – Appointment of appellant in ESM BC(B) category – Quashed by Court – Termination – Challenge to – Respondents directed by Court to consider the case of appellant in general category – Case of appellant considered but he was declined appointment in that category – Writ petition filed by appellant – Dismissed by High Court – On appeal, held: The two candidates selected in ESM BC(B) category ahead of the appellant ought to have been selected against vacancies in ESM (General) category as per their merit since they scored more marks than the last two candidates in the ESM (general) category – The Select List thus was required to be recast and candidates suitably shifted from reserved category to general category in which event appointments could be offered to other candidates in ESM BC(B) category such as appellant depending on their merit – However such exercise at this distant point of time could unsettle the settled position – In interest of justice, direction given for fresh appointment of appellant against any vacancy in ESM (General Category) or ESM BC (B) category, and if no vacancy available in the said two categories, for fresh appointment against any vacancy in General category – Such appointment, however, would not entitle appellant to any back

wages, seniority or any other benefit based on his earlier appointment.

Selection process was initiated to fill up available posts of Constables in the Haryana Police. Apart from vacancies in the General category there were vacancies in the reserved categories also, including the reserved category for ex-servicemen, which in turn was divided into three distinct sub categories, namely, ESM (General Category), ESM BC(A) and ESM BC(B) category.

Appellant, a candidate in the reserved category of ESM/BC(B), was eventually placed at Sr.No.3 in the ESM/BC(B) category. An appointment order was issued in his favour pursuant whereto he joined the Police Department.

An unsuccessful candidate in ESM/BC(B) category challenged the appointment of appellant before the High Court contending that he had a preferential right to appointment in the ESM/BC(B) category on account of his being an ex-serviceman in comparison to appellant, who being a dependent of an ex-serviceman, stood a chance only if no ex-serviceman was available for appointment. The High Court quashed the appointment of the appellant with a direction that the claim of ex-servicemen candidates would have priority over those who are dependents of such ex-servicemen. Consequent upon the said direction, the services of the appellant were terminated.

Appellant challenged the termination order before the High Court which directed the respondents to consider the case of the appellant in the general category. In compliance with the above direction the Superintendent of Police considered the case of the appellant but declined him appointment in that category.

The appellant filed writ petition before the High Court

praying for issue of writ of certiorari quashing the order passed by the Superintendent of Police as also a mandamus directing the respondents to supply a complete list of selected candidates in respect of all the categories. The High court dismissed the petition holding that since the marks scored by the appellant were less than the marks awarded to the last candidate in the general category, he could make no grievance against his non-selection in that category.

Before this Court, the appellant contended that the denial of appointment to him was discriminatory, wholly unjustified and arbitrary. He contended that the High Court had failed to notice certain important aspects that render the order unsustainable, in particular the fact that two of the candidates selected in the reserved category having scored marks that were higher than those scored by the last candidate selected in the general category, the said candidates ought to have been selected against vacancies in the general merit category, and that if that were done, the appellant could be appointed against one of the said vacancies.

Partly allowing the appeal, the Court

HELD: 1.1. It is evident from the records that in ex-servicemen (general category) the last two candidates had scored only 25 marks each and the two candidates selected in Ex-servicemen BC(B) category ahead of the appellant, scored more marks than them, and thus could and indeed ought to have been selected against the vacancies in Ex-servicemen (General) category as per their merit. This in other words would require the Select List to be recast and candidates suitably shifted from the reserved category to the general category in which event appointments can be offered to other candidates in the Ex-servicemen BC(B) category depending on their merit. Such an exercise long after the selection process was

completed may unsettle the settled position and lead to removal of candidates who stand already selected and who have been serving for a long time after undergoing the prescribed training. This may also mean that candidates who have accepted the result of the selection and may even have become over-age may have to be brought in. There is no compelling reason for this Court to adopt that course at this distant point of time especially when the same would upset what stands settled for a long time. [Para 9] [125-C-G]

1.2. Interest of justice would be sufficiently served, if the appellant is appointed as a Constable in the Haryana Armed Police against any vacancy in the Ex-Servicemen (General Category) or ESM/BC (B) category. If no vacancy in the said two categories is available the appellant shall be appointed against any vacancy in the General category. The appointment shall for all intents and purpose be a fresh appointment which would not entitle the appellant to any back wages, seniority or any other benefit based on his earlier appointment. [Paras 9, 10] [125-G-H; 126-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3127 of 2008.

From the Judgment & Order dated 23.1.2007 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 1061 of 2007.

P.S. Patwalia, Aman Preet Singh Rahi, Ajay Singh, Ashok K. Mahajan for the Appellant.

Manjit Singh, ASG, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal arises out of an order

passed by the High Court of Punjab & Haryana, whereby Writ Petition No.1061 of 2007 filed by the appellant has been dismissed and the appellant's claim for appointment as a Constable in the Haryana Police Department turned down. The High Court has taken the view that since the marks scored by the appellant were less than the marks awarded to the last candidate in the general category, he could make no grievance against his non-selection in that category. The appellant assails that view primarily on the ground that the High Court has failed to notice certain important aspects that render the order unsustainable, in particular the fact that two of the candidates selected in the reserved category having scored marks that were higher than those scored by the last candidate selected in the general category, the said candidates ought to have been selected against vacancies in the general merit category. If that were done, the appellant could be appointed against one of the said vacancies. The factual matrix giving rise to the controversy need be summarized at this stage:

2. A selection process to fill up 100 available posts of Constables in Haryana Police in the District of Sirsa, State of Haryana was undertaken in which the appellant was also a candidate for appointment against one of the vacancies in the reserved category of ESM/BC(B) for ex-servicemen and their dependents. The appellant was put through physical efficiency and other tests and eventually placed at Sr. No.3 in the ESM/BC(B) category. An appointment order was also issued in his favour pursuant whereto he joined the Police Department on 17th August 2001 and was allotted Constabulary No.2/873 in the 2nd Battalion of the Haryana Armed Force.

3. One, Naresh Kumar who had also applied for selection in ESM/BC(B) category and whose name did not figure in the select list filed Civil Writ Petition No.13130 of 2001 in the High Court of Punjab & Haryana challenging the appointment of the appellant mainly on the ground that the said petitioner had a preferential right to an appointment in the ESM/BC (B) category on account of his being an ex-serviceman in comparison to the

appellant who being a dependent of an ex-serviceman would stand a chance only if no ex-serviceman was available for appointment. The appellant had in the meantime completed the Basic Training Course of nine months duration, passed out in May 2002 and started discharging the duties attached to the post to which he was appointed. The High Court, all the same, allowed the writ petition filed by Naresh Kumar and by its order dated 10th July 2002 quashed the appointment of the appellant with a direction that the claim of ex-servicemen candidates would have priority over those who are dependents of such ex-servicemen. Consequent upon the said direction, the services of the appellant were terminated in terms of an order dated 31st December 2002, the correctness whereof was questioned by the appellant in CWP No.16287 of 2003. The said petition was eventually dismissed as withdrawn with liberty to the appellant to file a review petition against the order of the High Court in CWP No.13130 of 2001. A review petition was accordingly filed by the appellant which was disposed of by the High Court by an order dated 10th March 2006 directing the respondents to re-consider the case of the appellant in the general category. Order dated 10th July 2002 passed by the High Court in CWP No.13130 of 2001 was to that extent modified.

4. It was in compliance with the above direction that the Superintendent of Police, Sirsa passed an order on 26th May 2006 declining an appointment to the appellant as a Constable. The order stated that out of eight candidates in BC(B) category the last candidate selected for appointment had scored 27 marks as against 26 marks awarded to the appellant. The order further stated that out of 45 candidates selected in the General category the last candidate selected for appointment had scored 27 marks. Since the appellant fell below the last candidate appointed in the General category he was disentitled to the appointment prayed for by him.

5. The appellant's case is that the order passed by the Superintendent of Police did not disclose the marks obtained

by BC(B) category candidates selected against the eight posts reserved in that category. An application seeking the requisite information and copies of the select list was accordingly filed under the Right to Information Act, but was declined by the State Information Commission on the ground that the Haryana Armed Police was exempt from the purview of the RTI Act. It was in that backdrop that the appellant filed CWP No.1061/2007 before the High Court praying not only for the issue of a writ of certiorari quashing the order dated 26th May 2006 passed by the Superintendent of Police but also a mandamus directing the respondents to supply a complete list of selected candidates in respect of all the categories. By its order dated 23rd January 2007 impugned in this appeal, the High court has dismissed the said petition primarily on the ground that the last candidate selected both in the BC(B) category and in the General category having scored 27 marks each as against 26 marks awarded to the appellant, he was not qualified for appointment in either of the said two categories. The appellant assails the correctness of the said order, as already noticed above.

6. Mr. P.S. Patwalia, learned senior counsel appearing for the appellant strenuously argued that the denial of appointment to the appellant is discriminatory, wholly unjustified and arbitrary. He urged that according to the select list enclosed with the affidavit filed on behalf of respondent No.1 - the State, 45 candidates were selected in the General Category, 14 in BC(A) category and eight in BC(B) category, apart from candidates selected in SC 'A' and SC 'B' categories. Insofar as ex-servicemen category was concerned, the Select List reveals that there were eight vacancies available for ex-servicemen in the General category, while two vacancies were earmarked for ex-servicemen BC(A) category and three vacancies for ex-servicemen BC(B) category. It was argued by Mr. Patwalia and in our opinion rightly so that if an ex-serviceman candidate scored high enough marks entitling him to be selected in the ex-serviceman (General Category) such candidates ought to be selected in the said category instead of selecting them in the

Ex-servicemen BC(A) or BC(B) categories. Mr. Patwalia argued that in BC(A) category, two candidates, namely, Rajbir Singh and Ranjeet Singh had been selected who had scored 29 and 28 marks respectively. Similarly in BC(B) category, Sube Singh, Veer Bhan and the appellant Ravinder Kumar had been initially selected each one of whom had scored 26 marks. With the High Court directing appointment of ex-servicemen before any dependent of any ex-serviceman could be appointed the appellant had to vacate to make room for Naresh Kumar, who was an ex-serviceman in BC(B) category. Even so two vacancies out of eight reserved for in the Ex-Servicemen (General category) had gone to Subhash Chander and Taket Singh both of them had scored 25 marks each. This implied that if candidates selected in Ex-Servicemen BC(B) categories were shifted to the Ex-Servicemen (General category) both Sube Singh and Veer Bhan would have moved to the General category, making room for the appellant to take an appointment in the BC(B) category. Inasmuch as the respondents had ignored the principle underlying the selection of candidates in reserved categories even when such candidates had scored better marks than the candidates selected in the open category, the respondents had committed a mistake which deserved to be corrected. The order passed by the Superintendent of Police did not, according to the learned counsel, take note of these aspects and adopted an approach which was legally unsound. It was also argued by Mr. Patwalia that the appellant had undergone training and even started serving the Police Department before he was asked to vacate the post which was then allotted to Naresh Kumar. This, according to the learned counsel, had happened despite the fact that the appellant was nowhere at fault. He had on the contrary changed his position to his detriment by undergoing an arduous training apart from losing opportunities to seek employment elsewhere.

7. On behalf of the respondents, it was argued by Mr. Manjit Singh, learned Additional Advocate General that the appointment of the appellant could be justified only if the

appellant figured higher in the merit list than the last candidate in the General category. Inasmuch as the appellant failed to satisfy that requirement both in the General category as also in general and reserved categories for ex-servicemen he could make no grievance against refusal of an appointment to him.

8. When this appeal came up before this Court, Mr. Patwalia made a statement on instructions that if the appellant was offered employment as a Constable in the Haryana Police, District Sirsa even at this stage he will not claim back wages or seniority on the basis of his selection and appointment. Learned counsel for the State was accordingly directed to take instructions whether the appellant could be accommodated against a vacant post in the said District. Mr. Manjit Singh, is however unable to make any statement pursuant to the above direction as according to him the respondents had not suitably responded to his queries nor given to him any instructions in the matter one way or the other. He therefore sought further time to do the needful. We regret our inability to grant any further opportunity having regard to the fact that the matter has remained pending in this Court and the Court below for long and two opportunities for the purpose aforementioned have already been granted to the respondents. The controversy as noticed above primarily revolves around the method adopted by the respondents in drawing up the Select List of candidates. Apart from the vacancies in the General category there were, as noticed above, vacancies for reserved categories also. The reserved category for ex-servicemen was divided into three distinct sub categories, namely, Ex-servicemen (General Category), Ex-servicemen BC(A) and Ex-servicemen BC(B) category. The names of the candidates and the marks awarded to them in each one of these categories were as under:-

"EX-SERVICEMEN

GENERAL CATEGORY

1.	6003	Durga Dass	27
2.	6005	Balbir Singh	27
3.	6037	Ved Parkash	26

4.	6007	Ram Sarup	26
5.	6015	Rajender Parshad	26
6.	6010	Gurpal Singh	26
7.	6023	Subhash Chander	25
8.	6027	Taket Singh	25

B.C. 'A'

1.	6028	Rajbir Singh	29
2.	6016	Ranjeet Singh	28

B.C. 'B'

1.	6001	Sube Singh	26
2.	6035	Veer Bhan	26
3.	6031	Ravinder	26"

9. It is evident from the above that in ex-servicemen (general category) the last two candidates namely: Subhash Chander and Taket Singh had scored only 25 marks each. Sube Singh and Veer Bhan selected in Ex-servicemen BC(B) category had however scored more marks than Subhash Chander and Taket Singh. Sube Singh and Veer Bhan could and indeed ought to have been selected against the vacancies in Ex-servicemen (General) category as per their merit. This in other words would require the Select List to be recast and candidates suitably shifted from the reserved category to the general category in which event appointments can be offered to other candidates in the Ex-servicemen BC(B) category depending on their merit. Such an exercise long after the selection process was completed may unsettle the settled position and lead to removal of candidates who stand already selected and who have been serving for a long time after undergoing the prescribed training. This may also mean that candidates who have accepted the result of the selection and may even have become over-age may have to be brought in. We do not see any compelling reason for us to adopt that course at this distant point of time especially when the same would upset what stands settled for a long time. Interest of justice would in our opinion be sufficiently served if we direct

the appointment of the appellant against an Ex-servicemen BC(B) vacancy and if no such vacancy is available against an ex-servicemen (General Category) vacancy. In the unlikely event of there being no vacancy in either one of these categories the appellant could be appointed against any other vacancy in the General category. Any such appointment would, however, in keeping with the statement by the appellant be effective from the date the same is made and shall not entitle the appellant to claim any back wages, seniority or other benefits. The appointment shall for all purposes be treated as a first appointment subject to the condition that the competent authority shall be free to direct that the appellant shall undergo the training afresh or take a refresher course of such training if deemed fit.

10. In the result, we allow this appeal but only in part and to the extent that the appellant shall be appointed as a Constable in the Haryana Armed Police, Sirsa District against any vacancy in the Ex-Servicemen (General Category) or ESM/ BC (B) category. If no vacancy in the said two categories is available the appellant shall be appointed against any vacancy in the General category. The appointment shall for all intents and purpose be a fresh appointment which would not entitle the appellant to any back wages, seniority or any other benefit based on his earlier appointment. The order passed by the High Court shall to the above extent, stand modified. No costs.

B.B.B. Appeal partly allowed.

CHIEF EXECUTIVE OFFICER, ZILLA PARISHAD
v.
STATE OF MAHARASHTRA & OTHERS
(Civil Appeal No. 2048 of 2007)

APRIL 22, 2010

[J.M. PANCHAL AND DR. MUKUNDAKAM SHARMA, JJ.]

Service Law – Termination – Respondent no. 2 appointed as temporary Assistant Teacher in Scheduled Tribes category – Tribe Certificate produced by him found invalid by Scheduled Tribe Caste Scrutiny Committee – Consequent termination of respondent no.2 – He applied to Government to reinstate him in service claiming that he belonged to S.B.C.(Special Backward Class) category and seeking protection under a Government Resolution which inter alia, specified the castes considered as SBC – Government directed the appellant to take necessary action in favour of respondent no.2 in view of the said Resolution – Respondent no.2, however, not reinstated in service – Writ petition filed by him allowed by High Court – On appeal, held: Once the Scheduled Tribe certificate produced by respondent no.2 was invalidated by the Caste Scrutiny Committee, his appointment became void from the beginning – The void appointment could not have been validated by the Government –However, on peculiar facts, it would be harsh to direct the termination of respondent no.2 since he is in service till date after the impugned judgment was rendered by High Court – Since no post belonging to SBC category is available with appellant, in interest of justice, Government directed to create supernumerary post to accommodate respondent no.2 with liberty to get the SBC Caste Certificate produced by him verified through the Caste Scrutiny Committee – Consequential directions given.

Respondent no. 2 was appointed as a temporary

Assistant Teacher in the Scheduled Tribes category, subject to verification of his tribe claim. The tribe Certificate produced by respondent no. 2 was forwarded for verification to the Scheduled Tribe Caste Scrutiny Committee, which found the said certificate to be invalid. Consequently the services of respondent no.2 were terminated.

Subsequently, Respondent No.2 applied to the Government to reinstate him in service claiming that he belongs to S.B.C.(Special Backward Class) category and should be granted protection of Government Resolution dated June 15, 1995, which *inter alia*, specified the Castes considered as SBC. The Government addressed a letter to the appellant stating that even if the certificate indicating that respondent no.2 belongs to Scheduled Tribes was invalidated by the Scrutiny Committee, he would be entitled to get protection in service in view of Government Resolution dated June 15, 1995 because he had submitted a validity certificate indicating that he belongs to Special Backward Class, and accordingly directed the appellant to take necessary action in the matter. Inspite of the protection given by the Government, respondent no.2 was not reinstated in service. Therefore, he filed writ petition challenging the order terminating his services, which was allowed by the High Court. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1. The well settled principle of law is that once the certificate indicating that a person belongs to Scheduled Tribe is invalidated by the Caste Scrutiny Committee, his appointment becomes void from the beginning. The void appointment could not have been validated by the Government by addressing a communication to the appellant. The case of the appellant before the High Court was that from the quota made

available to Special Backward Class (SBC) candidates, the post was filled up and no vacant post was available. Thereupon, the High Court directed the appellant to place a staffing pattern including the sanctioned posts available and the occupation thereof by different candidates. In view of the above mentioned direction given by the High Court, the appellant furnished necessary particulars by filing reply. In the reply it was pointed out that the Education Officer, Primary, Z.P. had informed the appellant that in the category of Secondary School Teachers, there were four posts reserved for S.B.C. and all of them were filled up. Though these particulars were placed before the High Court by way of reply filed on behalf of the appellant, the High Court did not record any finding as to whether the posts reserved for Special Backward Class were available or not and, directed the appellant to reinstate the respondent No. 2 in service forthwith pursuant to order passed by the Government with back wages from the date of passing of the order by the State Government and to grant the benefit of continuity in service on reinstatement; even though the data produced by the appellant before the High Court by filing reply, which indicated that no S.B.C. post was available, was not controverted by the State Government at all. [Paras 5, 6] [133-G-H; 134-A-E; 135-A-C]

2. The record shows that pursuant to the judgment of the High Court, impugned in this appeal, the respondent No. 2 has already been reinstated in service. The record would also show that the respondent No. 2 was in service for the period when his services were terminated as his Caste Certificate was invalidated by the Caste Scrutiny Committee. Again, he is in service after impugned judgment was rendered, till date and, therefore, it would be harsh to direct termination of services of the respondent No. 2. Further the Government had passed the order on the basis of certificate produced by the

respondent No. 2, which indicated that he belongs to Special Backward Class. The record also shows that he had produced this Certificate indicating that he belongs to Special Backward Class before the appointment, but the appellant had not taken any steps to get it verified through the Caste Scrutiny Committee. [Para 6] [135-C-F]

3. In view of the fact that no post belonging to the Special Backward Class category is available with the appellant, interest of justice would be served if the Government is directed to create supernumerary post in the appellant No. 1 institution to accommodate the respondent No. 2 with liberty to get the said Caste Certificate verified through the Caste Scrutiny Committee. Consequently, the respondent No. 1, i.e., State of Maharashtra, is directed to create a supernumerary post in the appellant No. 1 institution to accommodate the respondent No. 2. It would be open to the State of Maharashtra and the appellant to get the Caste Certificate submitted by the respondent No. 2, indicating that he belongs to Special Backward Class, verified from the Caste Scrutiny Committee. If the Caste Scrutiny Committee comes to the conclusion that the Caste Certificate submitted by the respondent No. 2 is valid, he would be continued in service and granted all benefits except back wages to the date of his reinstatement in service pursuant to the impugned judgment. If the claim made by the respondent No. 2 that he belongs to Special Backward Class is not upheld by the Caste Scrutiny Committee, the appellant would be entitled to take appropriate action against him in accordance with law. [Paras 6, 7] [135-F-H; 136-A, C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2048 of 2007.

From the Judgment & Order dated 31.8.2004 of the High

Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No. 1764 of 2003.

M.S. Nargolkar, Anagha Desai, Venkateswara Rao, Anmolu, D.M. Nargolkar, Sanjay V. Kharde, (for Asha G. Nair) for the appearing parties.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The challenge in this appeal is to the judgment dated August 31, 2004, passed by the Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, in Writ Petition No. 1764 of 2003 whereby writ petition filed by respondent No. 2, i.e., Gajanan Sadashiv Ghule, was allowed by setting aside the order of termination of his services dated May 4, 1998.

2. Briefly stated the facts of the case are as follows:

Claiming that he belongs to Scheduled Tribe, the respondent No. 2 applied to the appellant to appoint him as an Assistant Teacher. The respondent No. 2 was selected by the Subordinate Selection Board from the Scheduled Tribes category and was appointed as Assistant Teacher temporarily on January 16, 1993. The appointment of the respondent No. 2 was subject to verification of his tribe claim. The tribe Certificate produced by the respondent No. 2 was forwarded for verification to Scheduled Tribe Caste Scrutiny Committee (the 'Scrutiny Committee' for short). Some of the documents submitted by respondent No. 2 indicated that he was a "Hindu Koli". The Scrutiny Committee, after giving the respondent No. 2 an opportunity of hearing, invalidated the tribe Certificate by decision dated November 6, 1997. The respondent No. 2 was holding the post of Assistant Teacher temporarily, which was specifically reserved for Scheduled Tribe. Therefore, the appellant terminated services of the respondent No. 2 by order dated May 4, 1998. Thereupon, the respondent No. 2 filed writ petition No. 1660 of 1998 before the Nagpur Bench of Bombay

High Court. He challenged the order terminating his services as well as order dated November 6, 1997, passed by the Scrutiny Committee. It was pointed out to the Division Bench of the High Court, hearing the said matter, that interview was fixed by the Scrutiny Committee on November 6, 1997, but the respondent No. 2 received notice in that behalf on November 12, 1997. The said submission made on behalf of respondent No. 2 was accepted by the High Court. The High Court set aside the order dated November 6, 1997 invalidating caste claim of the respondent No. 2 and directed the Scrutiny Committee to decide the matter afresh after affording necessary opportunity of hearing to him. The Court further directed respondent No. 2 to appear before the Scrutiny Committee on January 29, 1999 along with all necessary documents. The respondent No. 2 appeared before the Scrutiny Committee on January 29, 1999, but requested for grant of time and, therefore, he was called upon to appear on December 30, 1999. Again, the respondent No. 2 appeared before the said Committee on December 30, 1999 and prayed to grant time. The record shows that thereafter the respondent No. 2 was not interested in prosecuting the inquiry before the Scrutiny Committee. The respondent No. 2 filed Writ Petition No. 879 of 1999 challenging the order dated May 4, 1998 by which his services were terminated by the appellant. The Bombay High Court, Nagpur Bench, by judgment dated April 17, 2000, dismissed the said writ petition with the observation that the respondent No. 2 was not interested in proceeding further with the inquiry before the Scrutiny Committee and was delaying the entire proceedings on some or the other pretext.

3. After dismissal of the writ petition, the respondent No. 2 appeared before the Scrutiny Committee on April 24, 2000, but prayed to grant time. Therefore, the Scrutiny Committee adjourned the hearing to June 26, 2000. On the said date also the respondent No. 2 requested for more time, which was granted by the Scrutiny Committee. Thereafter, the respondent No. 2 did not appear before the said Committee at all and,

therefore, the Scrutiny Committee decided to close the matter of verification of tribe claim of the respondent No.2, by order dated November 13, 2000. After a lapse of about three years from the date of dismissal of Writ Petition No. 879 of 1999, the respondent No.2 applied to the Government to reinstate him in service claiming that he belongs to S.B.C. category and should be granted protection of Government Resolution dated June 15, 1995. The said Resolution dated June 15, 1995, inter alia, specifies as to which Caste should be considered as Special Backward Class. The Rural Development and Water Conservation Department of the Government of Maharashtra, therefore, addressed a letter dated February 6, 2002 to the appellant stating that the respondent No. 2 was appointed as Assistant Teacher by order dated October 6, 1992 (correct date of the appointment is January 16, 1993) by the appellant on the post reserved for Scheduled Tribe and even if the certificate indicating that he belongs to Scheduled Tribes was invalidated by the Scrutiny Committee, he would be entitled to get protection in service in view of Government Resolution dated June 15, 1995 because he has submitted a validity certificate indicating that he belongs to Special Backward Class. By the said letter the appellant was directed to take necessary action in the matter. In spite of the protection given by the Government, the respondent No. 2 was not reinstated in service. Therefore, he filed Writ Petition No. 1764 of 2003 challenging the order dated May 4, 1998 terminating his services. The Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, has allowed the same by judgment dated August 31, 2004, giving rise to the instant appeal.

4. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal.

5. From the record, it is evident that the stand of the respondent No. 1, i.e., the State of Maharashtra, is that the respondent No. 2 is entitled to the protection of Government Resolution dated June 15, 1995. The well settled principle of

law is that once the certificate indicating that a person belongs to Scheduled Tribe is invalidated by the Caste Scrutiny Committee, his appointment becomes void from the beginning. The void appointment could not have been validated by the Government by addressing a communication to the appellant. The case of the appellant before the High Court was that from the quota made available to Special Backward Class candidates, the post was filled up and no vacant post was available. However, the High Court, by order dated December 16, 2003, directed the appellant to place a staffing pattern including the sanctioned posts available and the occupation thereof by different candidates and clarified that the writ petition filed by the respondent No. 2 would be heard thereafter finally at the stage of admission.

6. In view of the above mentioned direction given by the High Court the appellant furnished necessary particulars by filing reply. In the reply it was pointed out that the Education Officer, Primary, Z.P., Buldhana vide letter dated January 2, 2004 had informed the appellant that in the category of Secondary School Teachers, there were four posts reserved for S.B.C. and all of them were filled up as under: -

LOWER GRADE ASSISTANT TEACHER

S.No.	Caste	Sanctioned Posts	Posts filled in	Vacant Posts
1.	Open	155	146	09
2.	S.B.C.	04	04	—

S.B.C.: -

1. Sunil Meharkar
2. Ku. Jyoti Dnyaneshwar Thakre-Palshi Bu.
3. Ku. Jyoti Prabhakar Bawatkar-Mangrul Nawaghare
4. Vilas Sitaram Wawre

Though these particulars were placed before the Division Bench of the High Court by way of reply filed on behalf of the appellant, the Division Bench did not record any finding as to whether the posts reserved for Special Backward Class were available or not and has, by the impugned judgment, directed the appellant to reinstate the respondent No. 2 in service forthwith pursuant to order dated February 6, 2002, passed by the Government with back wages from the date of passing of the order by the State Government and to grant the benefit of continuity in service on reinstatement. What is relevant to notice is that the data, which was produced by the appellant before the Division Bench of the High Court by filing reply, which indicated that no S.B.C. post was available, was not controverted by the State of Maharashtra at all. The record shows that pursuant to the judgment of the High Court, impugned in this appeal, the respondent No. 2 has already been reinstated in service. The record would also show that the respondent No. 2 was in service from January 16, 1993 till May 4, 1998 when his services were terminated as his Caste Certificate was invalidated by the Caste Scrutiny Committee. Again, he is in service after impugned judgment was rendered on August 31, 2004 till date and, therefore, it would be harsh to direct termination of services of the respondent No. 2. This Court further finds that Government had passed the order on February 6, 2002 on the basis of certificate produced by the respondent No. 2, which indicated that he belongs to Special Backward Class. The record also shows that he had produced this Certificate dated June 12, 2002 indicating that he belongs to Special Backward Class before the appointment, but the appellant had not taken any steps to get it verified through the Caste Scrutiny Committee. In view of the fact that no post belonging to the Special Backward Class category is available with the appellant, this Court is of the opinion that interest of justice would be served if the Government is directed to create supernumerary post in the appellant No. 1 institution to accommodate the respondent No. 2 with liberty to get the said

Caste Certificate verified through the Caste Scrutiny Committee.

7. For the foregoing reasons the appeal partly succeeds. The respondent No. 1, i.e., State of Maharashtra, is directed to create a supernumerary post in the appellant No. 1 institution to accommodate the respondent No. 2 as early as possible and preferably within two months from the date of receipt of the writ from this Court. It would be open to the State of Maharashtra and the appellant to get the Caste Certificate dated June 12, 2002, submitted by the respondent No. 2, indicating that he belongs to Special Backward Class, verified from the Caste Scrutiny Committee. If the Caste Scrutiny Committee comes to the conclusion that the Caste Certificate submitted by the respondent No. 2 is valid, he would be continued in service and granted all benefits except back wages from February 6, 2002 to the date of his reinstatement in service pursuant to the impugned judgment. If the claim made by the respondent No. 2 that he belongs to Special Backward Class is not upheld by the Caste Scrutiny Committee, the appellant would be entitled to take appropriate action against him in accordance with law.

8. Subject to above mentioned observations and clarifications the appeal stands disposed of. There shall be no order as to costs.

B.B.B. Appeal partly allowed.

DHARAMBIR

v.

STATE (NCT OF DELHI) AND ANR.

(Criminal Appeal No.860 of 2010)

APRIL 23, 2010

[D.K. JAIN AND J.M. PANCHAL, JJ.]

Juvenile Justice (Care and Protection of Children) Act, 2000 – ss.2(k), 2(l), 7A, 20 and 49 – Relevant date for determining the applicability of the Act of 2000 – Murder and attempt to murder – Incident occurred in 1991 – Accused-appellant aged 16 years and 9 months at that time and hence not a juvenile within meaning of the Act of 1986 – Conviction and sentence of appellant by regular court – Meanwhile, Act of 2000 came into force w.e.f 1st April, 2001 – Claim of appellant that he was juvenile within meaning of the Act of 2000 since he had not completed 18 years of age at the time of commission of the said offences – Tenability of – Held: Tenable – All persons below the age of 18 years on the date of commission of offence, even prior to 1st April, 2001, would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of 18 years on or before the date of the commencement of the Act of 2000, and were undergoing sentences upon being convicted – However, since the maximum period of detention under the Act of 2000 was for three years and appellant had already undergone an actual period of sentence of 2 years, 4 months and 4 days and is now aged about thirty five years, his case not forwarded to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000 – Conviction of appellant sustained but quantum of sentence reduced to the period already undergone – Juvenile Justice (Care and Protection of Children) Rules, 2007 – rr.12 and 98 – Juvenile Justice Act, 1986.

Appellant allegedly committed the murder of a close relative and attempted to murder his brother. On the date of commission of the said offences i.e. on 25th August, 1991, appellant was aged 16 years, 9 months and 8 days. He was thus not a juvenile within the meaning of the Juvenile Justice Act, 1986 when the offences were committed. Appellant was convicted by the regular trial court u/s. 302 and 307 r/w s. 34 of IPC. The conviction was upheld by the High Court.

Before this Court, the appellant contended at the very outset that since at the time of commission of the said offences, he had not completed 18 years of age, he was a juvenile within the meaning of s.2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Partly allowing the appeal, the Court

HELD: 1.1. The issue with regard to the date, relevant for determining the applicability of either of the two Acts, i.e. Juvenile Justice Act, 1986 and Juvenile Justice (Care and Protection of Children) Act, 2000 insofar as the age of the accused, who claims to be a juvenile/child, is concerned, is no longer *res integra*. [Para 7] [144-D]

1.2. In a Constitution Bench judgment of this Court, it has been held that the relevant date for determining the age of the accused, who claims to be a juvenile/child, would be the date on which the offence has been committed and not the date when he is produced before the authority or in the court. In the same judgment, the Bench also dealt with the question as to whether the Act of 2000 will be applicable in a case where proceedings were initiated under the 1986 Act and were pending when the Act of 2000 was enacted with effect from 1st April, 2001. Taking into consideration the provisions of Sections 3 and 20 along with the definition of "juvenile" in Section 2(k) of the Act of 2000, as contrasted with the

definition of a male juvenile in Section 2(h) of the 1986 Act, by majority, it was held that the Act of 2000 would be applicable in a pending proceeding in any Court/ Authority initiated under the 1986 Act and is pending when the Act of 2000 came into force and the person concerned had not completed 18 years of age as on 1st April, 2001. In other words, it was held that a male offender, against whom proceedings had been initiated under the 1986 Act in any Court/Authority and had not completed the age of 18 years as on 1st April, 2001, would be governed by the provisions of the Act of 2000. The said decision led to substitution of Section 2(*l*); the insertion of Section 7A and Proviso and Explanation to Section 20 of the Act of 2000 by Act No.33 of 2006 as also introduction of the Juvenile Justice (Care and Protection of Children) Rules, 2007 containing Rule12, which lays down the procedure to be followed in determination of age of a child or a juvenile. [Paras 7, 8, 9] [144-F-G; 145-A-D]

Pratap Singh v. State of Jharkhand & Anr. **(2005) 3 SCC 551, followed.**

Umesh Chandra v. State of Rajasthan **(1982) 2 SCC 202 and** *Arnit Das v. State of Bihar* **(2000) 5 SCC 488, referred to.**

2.1. It is plain from the language of the Explanation to Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged

offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000. [Para 11] [146-D-G]

2.2. The proviso to sub-section (1) of Section 7A contemplates that a claim of juvenility can be raised before any court and has to be recognised at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a juvenile who had not completed eighteen years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act. It is, thus, manifest from a conjoint reading of Sections 2(k), 2(*l*), 7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and

were undergoing sentences upon being convicted. [Para 12] [147-E-H; 148-A-B]

Hari Ram v. State of Rajasthan & Another **(2009) 13 SCC 211, relied on.**

3. In the present case, since the age of appellant as on the date of commission of offences, i.e., 25th August, 1991, was 16 years, 9 months and 8 days, he has to be held to be a juvenile as on the date of the commission of the offences for which he has been convicted and is to be governed by the provisions of the Act of 2000. [Para 14] [148-D-E]

4. As regards the sentence, section 15 of the Act of 2000 provides for various orders which the Juvenile Justice Board may pass against a juvenile when it is satisfied that the juvenile has committed an offence, which includes an order directing the juvenile to be sent to a special home for a period of three years. Section 16 of the Act of 2000 stipulates that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under the Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government. Proviso to sub-section (2) of Section 16 of the Act of 2000 provides that the period of detention so ordered shall not exceed in any case the maximum period provided under Section 15 of the said Act, i.e., for three years. In the instant case, the appellant underwent an actual period of sentence of 2 years, 4 months and 4 days and is now aged about thirty five years. Keeping in view the age of the appellant, it may not

be conducive to the environment in the special home and to the interest of other juveniles housed in the special home, to refer him to the Board for passing orders for sending the appellant to special home or for keeping him at some other place of safety for the remaining period of less than eight months, the maximum period for which he can now be kept in either of the two places. Accordingly, while sustaining the conviction of the appellant for the afore-stated offences, the sentences awarded to him are quashed and his release is directed forthwith, if not required in any other case. [Paras 15, 16] [148-G-H; 149-A-F]

Case Law Reference:

(1982) 2 SCC 202	**referred to**	**Para 7**
(2000) 5 SCC 488	**referred to**	**Para 7**
(2005) 3 SCC 551	**followed**	**Para 7**
(2009) 13 SCC 211	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 860 of 2010.

From the Judgment & Order dated 6.11.2009 of the High Court of Delhi at New Delhi in Crl. Appeal No. 140 of 1994.

K. Parasaran, Pradeep R. Tiwary, Ramesh K. Sharma, Atithi Dipankar for the Appellant.

H.P. Raval, ASG, P.K. Dey, Anil Katiyar, Rakesh K. Sharma for the Respondents.

The Judgment of the Court was delivered by

Leave granted.

2. This appeal is directed against the final judgment and order dated 6th November, 2009, delivered by the High Court

of Delhi at New Delhi, in Criminal Appeal No.140 of 1994. By the impugned judgment, while acquitting one of the co-convicts, the High Court has upheld the conviction of the appellant for offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code, 1860 (for short "the IPC"), for committing murder of one of their close relative and for attempting to murder his brother. The appellant has been sentenced to imprisonment for life under Sections 302/34 IPC and to pay a fine of Rs.500/-. For offence under Section 307/34 IPC, he has been sentenced to undergo rigorous imprisonment for a term of seven years and to pay a fine of Rs.500/-, with default stipulation.

3. When the matter came up for motion hearing, Mr. K. Parasaran, learned senior counsel, appearing for the appellant, submitted at the very outset that since at the time of commission of the said offences, the appellant had not completed eighteen years of age, he was a juvenile within the meaning of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act of 2000"), an inquiry in terms of Section 7A of the Act of 2000 has to be made so as to determine the age of the appellant. In support of the submission, learned counsel relied on the appellant's school leaving certificate dated 2nd December, 2009.

4. In view of the said claim, while issuing notice to the State, a Registrar of this Court was directed to make an inquiry and determine the age of the appellant on the date of commission of the offences. Pursuant to the said order, the Registrar (Judicial) of this Court has conducted a detailed inquiry by recording the statements of the Principal and other office bearers of three schools where the appellant had studied and has reported that as on the date when the offences were committed, i.e., 25th August, 1991, the appellant was of the age of 16 years, 9 months and 8 days. The matter has now been placed before us along with the report.

5. We have heard learned senior counsel appearing on behalf of the appellant and Mr. H.P. Raval, learned Additional Solicitor General on behalf of the State.

6. The question for determination is whether or not the appellant, who was admittedly not a juvenile within the meaning of the Juvenile Justice Act, 1986 (for short "the 1986 Act") when the offences were committed but had not completed 18 years of age on that date, will be governed by the Act of 2000 and be declared as a juvenile in relation to the offences alleged to have been committed by him?

7. Before adverting to the question, we may note that the issue with regard to the date, relevant for determining the applicability of either of the two Acts, insofar as the age of the accused, who claims to be a juvenile/child, is concerned, is no longer *res integra.* On account of divergence of views on the point in *Umesh Chandra Vs. State of Rajasthan*[1] and *Arnit Das Vs. State of Bihar,*[2] the matter was referred to the Constitution Bench in *Pratap Singh Vs. State of Jharkhand & Anr*[3]*.* Affirming the view taken by a Bench of three Judges in *Umesh Chandra's case* (supra), the Constitution Bench held that the relevant date for determining the age of the accused, who claims to be a juvenile/child, would be the date on which the offence has been committed and not the date when he is produced before the authority or in the court.

8. In the same judgment, the Bench also dealt with the question as to whether the Act of 2000 will be applicable in a case where proceedings were initiated under the 1986 Act and were pending when the Act of 2000 was enacted with effect from 1st April, 2001. Taking into consideration the provisions of Sections 3 and 20 along with the definition of "juvenile" in

1. (1982) 2 SCC 202.
2. (2000) 5 SCC 488.
3. (2005) 3 SCC 551

Section 2(k) of the Act of 2000, as contrasted with the definition of a male juvenile in Section 2(h) of the 1986 Act, by majority, it was held that the Act of 2000 would be applicable in a pending proceeding in any Court/Authority initiated under the 1986 Act and is pending when the Act of 2000 came into force and the person concerned had not completed 18 years of age as on 1st April, 2001. In other words, it was held that a male offender, against whom proceedings had been initiated under the 1986 Act in any Court/Authority and had not completed the age of 18 years as on 1st April, 2001, would be governed by the provisions of the Act of 2000.

9. The decision in Pratap Singh's case (supra) led to substitution of Section 2(l); the insertion of Section 7A and Proviso and Explanation to Section 20 of the Act of 2000 by Act No.33 of 2006 as also introduction of the Juvenile Justice (Care and Protection of Children) Rules, 2007 containing Rule12, which lays down the procedure to be followed in determination of age of a child or a juvenile.

10. Section 20 of the Act of 2000, the pivotal provision, as amended, reads as follows:

> "*20. Special provision in respect of pending cases*.— Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:
>
> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the

> case and pass appropriate order in the interest of such juvenile.
>
> *Explanation.*- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000.

12. At this juncture, it will be profitable to take note of Section 7A, inserted in the Act of 2000 with effect from 22nd August, 2006. It reads as follows:

> *"7A. Procedure to be followed when claim of juvenility is*

raised before any court.— (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

Proviso to sub-section (1) of Section 7A contemplates that a claim of juvenility can be raised before any court and has to be recognised at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a juvenile who had not completed eighteen years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act. It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7A, 20 and 49 of the

Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted.

13. In the view we have taken, we are fortified by the dictum of this Court in a recent decision in *Hari Ram* Vs. *State of Rajasthan & Another*[4].

14. In the present case, as per the report of the Registrar submitted in terms of Section 7A of the Act of 2000, the age of appellant as on the date of commission of offences, i.e., 25th August, 1991, was 16 years, 9 months and 8 days. The correctness of the estimate of age by the Registrar is not questioned by the State. The parties have, therefore, accepted the correctness of the age determined by the learned Registrar. In our considered opinion, in the light of the afore-stated legal position, the appellant has to be held to be a juvenile as on the date of the Commission of the offences for which he has been convicted and is to be governed by the provisions of the Act of 2000.

15. Having held so, the next question for consideration is as to what order on sentence is to be passed against the appellant for the offences committed by him under Sections 302 and 307 read with Section 34 IPC, correctness whereof has not been put in issue before us. Section 15 of the Act of 2000 provides for various orders which the Juvenile Justice Board (for short "the Board") may pass against a juvenile when it is satisfied that the juvenile has committed an offence, which includes an order directing the juvenile to be sent to a special home for a period of three years. Section 16 of the Act of 2000

4. (2009) 13 SCC 211.

stipulates that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under the Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government. Proviso to sub-section (2) of Section 16 of the Act of 2000 provides that the period of detention so ordered shall not exceed in any case the maximum period provided under Section 15 of the said Act, i.e., for three years. In the instant case, as per the information furnished to us, the appellant has undergone an actual period of sentence of 2 years, 4 months and 4 days and is now aged about thirty five years. We feel that, keeping in view the age of the appellant, it may not be conducive to the environment in the special home and to the interest of other juveniles housed in the special home, to refer him to the Board for passing orders for sending the appellant to special home or for keeping him at some other place of safety for the remaining period of less than eight months, the maximum period for which he can now be kept in either of the two places.

16. Accordingly, while sustaining the conviction of the appellant for the afore-stated offences, we quash the sentences awarded to him and direct his release forthwith, if not required in any other case. The appeal succeeds partly to the extent indicated above.

B.B.B. Appeal partly allowed.

M/S. A.P.T. ISPAT PVT. LTD.

v.

U.P. SMALL INDUSTRIES CORPORATION LTD. & ANR.

(Civil Appeal No. 663 of 2003)

APRIL 23, 2010

[AFTAB ALAM AND SWATANTER KUMAR, JJ.]

Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 – ss. 2 and 3 – Non-payment of dues, for the goods purchased from the financial Corporation – Corporation issuing recovery certificates u/s. 3 and also filing FIR alleging offences under IPC – Challenge to recovery certificate, dismissed by High Court – On appeal, held: The recovery certificates are illegal – Such certificates should be based on tangible agreement – Sale of good is not 'financial assistance', hence s. 3 not applicable – In view of FIR, goods were taken away in the course of criminal action – The Act is not intended to recover value of goods taken away in the course of criminal action – After coming into force of Debt Recovery Act, recourse cannot be taken to the U.P. Act – Recovery of Debts due to Financial Institutions Act, 1993 – s. 34 (2).

Managing Director of respondent-Corporation issued two recovery certificate in exercise of power u/s. 3 of U.P. Public Moneys (Recovery of Dues) Act, 1972, alleging therein that the directors of the appellant-company had not made payments for the goods purchased from one of the Depots of the Corporation. It also lodged FIR in this regard giving rise to a substantial criminal case, under various Sections of the Penal Code, 1860.

Appellant challenged the recovery certificates by filing a writ petition, which was dismissed by High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court has stretched the meaning of "financial assistance" as defined in Section 2 and the scope of Section 3 of U.P. Public Moneys (Recovery of Dues) Act, 1972 beyond reasonable limits. From a bare reading of Section 3 it is evident that the dues must arise from an agreement to which the person from whom recovery is to be made is a party. In the scheme of the Act, there is no provision for any adjudication. Once there is any default under an agreement, the designated authority is authorized to issue a recovery certificate and send it to the Collector who is obliged to recover the certificate amount together with interest from the certificate debtor as arrears of land revenue. At no stage, the certificate debtor is given an opportunity to put up his case. Such being the legal position, the recovery certificate must be based on a tangible agreement and it should even *prima facie* appear that the dues arise from a breach of the terms of the agreement. A proceeding u/s. 3 of the Act cannot be sustained by piling up assumptions in favour of the certificate-holder and against the judgment-debtor. [Para 14] [161-F-H; 162-A]

1.2. The appellant-company was purchasing wire rods as raw material from the Corporation. The sale of the goods would not become financial assistance rendered to the appellant unless it is shown that the supply of the goods was as a loan or grant or by way of hire purchase in terms of some agreement. [Para 13] [161-A-B]

1.3. In the facts of this case the two impugned recovery certificates are quite illegal and untenable. It is evident that the dues of which recovery is sought by the impugned certificates do not pertain to any loan, advance or grant given to the appellant or to any credit concerning any hire purchase of goods sold to the appellant by the

Corporation under any agreement, express or implied. The dues do not relate to any financial assistance. [Paras 15 and 17] [162-E-F; B]

1.4. In the present case, the so called supplies were not even made in the normal course of business. A reference to the FIR makes it clear that according to the Corporation the goods were taken away by the appellant in a criminal action constituting a number of offences under the Penal Code. The U.P. Public Moneys (Recovery of Dues) Act, 1972 was clearly not intended to recover the goods or the monetary value of goods taken away in course of theft or dacoity or lost as a result of dishonest appropriation or any other alleged criminal action. [Paras 16] [162-C-D]

2. After the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, recourse cannot be taken for recovery of dues to the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 because the U.P. Act does not find mention in Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. [Para 18] [162-G-H; 163-A]

Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and Ors. **(2003) 2 SCC 455, relied on.**

Case Law Reference:

(2003) 2 SCC 455	**Relied on.**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 663 of 2003.

From the Judgment & Order dated 26.4.2001 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 20 (MB) of 2001.

Shrish Kumar Misra, Amit Srivastava, Rajesh Goel for the Appellant.

Nikunj Dayal (for Pramod Dayal) for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The appellant is a private limited company incorporated and registered under the Companies Act. It seeks to challenge two recovery certificates issued by the Managing Director of the U.P. Small Industries Corporation Ltd. (a government corporation) in purported exercise of power under section 3 of the U. P. Public Moneys (Recovery of Dues) Act, 1972. Challenging the two recovery certificates, the appellant filed a writ petition (Civil Misc.20 of 2001) before the Allahabad High Court which was dismissed by a division bench of the Court by judgment and order dated April 26, 2001. Against the High Court judgment, the appellant has come in appeal by grant of special leave.

2. The Managing Director of the Corporation drew up the two identical recovery certificates and sent them to the District Magistrate, Lucknow, stating that the Directors of the appellant company had received from the Corporation's Dadanagar depot 1027.15 MT wire rods (iron and steel) worth Rs.1,54,93,421/- (Rupees one crore fifty four lakhs ninety three thousand four hundred twenty one only). But the payment of the goods had not been made to the Corporation and it was to be recovered from the persons (named in the recovery certificates as the company's Directors) together with interest. Paragraphs 1 and 3 of the recovery certificate are relevant for the present and are reproduced below:

> "1. Till 30.11.2000 a sum with interest of Rs.1,79,03,848=00 (Rupees one crore seventy nine lakhs three thousand eight hundred and forty eight only) has been due to the defaulter M/s A.P.T. Ispat Pvt. Ltd. and the said sum has to be recovered from the defaulter.

> 3. In accordance with the Government Order No. 12/3/7704/Revenue-7 dated 13.11.75 send the amount recovered from the defaulter by a bank draft drawn in favour of the Corporation (U.P. Small Industries Corporation Limited, Kanpur) to his office. "

3. It is significant to note that on the same day the Regional Manager of the Corporation, Kanpur region, submitted a written report to the Senior Police Officer, Kanpur Nagar, Kanpur. On the basis of the written report, a First Information Report was instituted giving rise to a substantive criminal case under various sections of the Penal Code against the persons named in it. In the written report it was stated that since the year 1994-95 M/s Anuj Steels whose proprietor was Anuj Tandon s/o Shri Durga Prasad Tandon was appointed by the Corporation as its Sales Coordinator for the purposes of selling iron and steel from the Corporation's Dadanagar godown at Kanpur as a raw material to small scale industries. According to the Memorandum of Understanding, the Coordinator booked the demand for iron and steel as might be required by the small scale industrial units with the Steel Authority of India Ltd. (SAIL). The SAIL would then dispatch the booked quantity of iron and steel either from its stockyard or by railway either on unsecured credit or on the deposit of money by the Coordinator. The Coordinator lifted the goods, through its Handling Contractor, either from the SAIL stockyard or from the railway siding and brought it to the UPSIDC godown at Dadanagar. The Coordinator was also responsible for selling the iron and steel bought from the SAIL to the small scale industrial units after depositing its value in the depot or in the regional office of Corporation.

4. The written report further stated that Anuj Tandon's brother Arun Tandon, the proprietor of M/s Pranay Sales was appointed as the Transporter of the Corporation for lifting the iron and steel from the railway siding and the SAIL stock yard and bringing the stock to the Dadanagar depot. Arun Tandon

extended cooperation to Anuj Tandon in the sale and purchase of the raw materials. He also participated in the meetings of the Corporation and performed several important jobs connected with the purchase and sale of iron and steel procured from the SAIL.

5. It is further stated that the appellant company is a small industrial unit whose directors were Ashok Tandon (another brother of Anuj and Arun), Prateak Tandon (son of Ashok Tandon) and Anuj Tandon. The appellant company was a purchaser of wire rods from Dadanagar depot of the Corporation.

6. From the statements made in the written statement, it is evident that the running of the day to day affairs of the Corporation was practically handed over to the members of the Tandon family. One does not know whether the arrangement, as stated in the written report, was made consciously, in collusion with the officers of the Corporation, or it came into being mindlessly and without any proper consideration of the Corporation's interests. Be that as it may, an arrangement of this kind was fraught with the risk of grave financial losses to the Corporation. And, as is further alleged in the written report, the Corporation actually came in for heavy losses. In the written report it is further alleged as follows:

> "On stock verification of Dadanagar Depot, it has come to the light that M/s A.P.T. Ispat Pvt. Ltd., Amausi, Lucknow, has taken away 1027.15 metric tonne wire rod worth Rs.1,54,93,421=00 (iron and steel raw material) from Dadanagar Depot which raw material was purchased by U.P.S.I.D.C. from Steel Authority of India on unsecured credit for supplying to the small industrial units at the instance of M/s Anuj Steels and the price of the said goods have not been deposited in the Depot or the bank account of the Corporation. The bills of the aforesaid raw material prepared by the employees of the Depot were found while

> no entry thereof has been made in the account books of the bills. In this manner, Arun Tandon, Anuj Tandon, Ashok Tandon, Prateak Tandon, R.N. Sharma, Depot Manager, Raw Materials Depot, Dadanagar, Kanpur, Jagdhari Yadav, Excise clerk, Lalji Yadav, Depot *Illegible,* Raw Material Depot, Dadanagar, Kanpur under a conspiracy to cause loss to the Corporation and to get for themselves unlawful gain have taken away iron and steel raw materials worth Rs.1,54,93,421=00 (Rupees one crore fifty four lakhs ninety three thousand four hundred twenty one only) and the Corporation has suffered a loss of Rs.1,54,93,421=00 and has been suffering loss of interest @ 21% per annum thereon. "

7. A bare reading of the FIR makes it manifest and clear that according to the Corporation the accused persons including the Directors of the appellant company entered into a conspiracy amongst themselves and with the staff of the Corporation and committed various offences, e.g. dishonest misappropriation of property, criminal breach of trust, cheating, theft, etc.

8. In fairness to the appellant it may be stated here that it has its own story to counter the allegations made in the FIR. According to the appellant, the Corporation owed it a sum of Rs.3,83,894 (Rupees three lakhs eighty three thousand and eight hundred ninety four only) and on December 7, 2000 the appellant had instituted Original Suit No.1245 of 2000 for injunction against the Corporation. The injunction suit was filed, when the officers of the Corporation started harassing the Directors of the appellant company and tried to subject them to undue pressure of government authorities, including the police. Mr. Shirish Kumar Mishra, learned counsel appearing for the appellant also invited our attention to the bills raised by the Corporation against the appellant company in support of its case. Mr. Mishra submitted that a bare glance at the bills would show that those were not drawn in the normal course of

business but were manufactured later as a prop to support the allegations made by the Corporation's officers.

9. The allegations made in the FIR against the appellant company and the counter allegations made by the appellant against the Corporation are of no concern to us for the present. We may assume for the purpose of the present case that the appellant company "received" from the Corporation the quantity of wire rods as stated in the two recovery certificates for which it has not made payment to the Corporation. But the question for consideration is whether the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972 can be pressed into service for realization of the dues of the kind indicated above.

10. Let us now take a look at the various provisions of the Act. Section 2(a) of the Act defines "Corporation" to include any corporation owned or controlled by the Central government or the state government or notified by the state government in the official gazette. Section 2(b) defines financial assistance as follows:

"2(b) "financial assistance" means any financial assistance-

(i) for establishing, expanding, modernizing, renovating or running any industrial undertaking; or

(ii) for purposes of vocational training; or

(iii) for the development of agriculture, horticulture, animal husbandry of agro-industry; or

(iv) for purposes of any other kind of planned development; or

(v) for relief against distress; "

Section 3 deals with recovery of *certain* dues as arrears of land revenue and insofar as relevant it is reproduced below:

"3. Recovery of certain dues as arrears of land revenue-(

1) Where any person is party-

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire purchase of, goods, sold to him by the State Government or the Corporation, by way of financial assistance;

(b) to any agreement……..

(c) to any agreement……..

(d) to any agreement…….

(i) makes any default in repayment of the loan or advance or any installment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant o any portion thereof, makes any default in the refund of such grant or portion or any installment thereof; or

(iii) otherwise fails to comply with the terms of the agreement;

then, in the case of the State Government, such officers as may be authorized in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company the Managing Director or where there is no Managing Director then the Chairman of the Corporation, or by whatever name called or such officers of the Corporation or Government company as may be authorized in that behalf by the Managing Director or the Chairman thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate to the Collector, mentioning the sum due from such person and

requesting such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue;

(2)……..

(3)……..

(4)……..

(5)……..”

11. Mr. Mishra submitted that the appellant company was neither receiving any financial assistance from the Corporation nor it was party to any agreement with the Corporation relating to any loan, advance or grant to it or relating to credit in respect of or relating to hire purchase of goods to it by the Corporation by way of financial assistance. Hence the provisions of section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972 could not be invoked for recovery of the alleged dues of the Corporation.

12. The same contentions were raised before the High Court, but the High Court rejected the objection raised on behalf of the appellant observing, in the judgment coming under appeal, as follows:

“The term financial assistance thus, means any financial assistance provided for running any industrial undertaking. If the term financial assistance is read along with section 3 of the Act then it would mean a party to any agreement relating to goods sold to him by the Corporation as financial assistance for running any industrial unit.

Admittedly, in the instant case, the petitioner had been purchasing wire rods materials from the respondent company for carrying on its business. *Thus the raw materials, that is, wire rods, were sold, to the petitioner by the respondent company by way of financial assistance.* Learned counsel for the petitioner has contended that in view of section 3 there should be an agreement for sale of goods by the corporation by way of financial assistance to any person and only then the case would be covered under section 3 of the Act. As there is no agreement between the petitioner and the respondent company for sale of goods by way of financial assistance and, therefore, the provisions of section 3 of the Act are not applicable.

There is no dispute about the fact that there is no written agreement between the petitioner and respondent Company for supply of raw materials to the petitioner. *It is, however, admitted that respondent company had been supplying raw materials to the petitioner-company for carrying all its business.* In writ petition no.Nil of 1987, in re: R.K. & Sons, Bhadoi vs. The Collector, Varanasi and Others, decided on 12.3.1987, it has been held by a Division Bench of this Court that *although there was no agreement executed in writing as such, an agreement may be said to have come into being as a result of mutual contact of the parties accompanied with delivery of goods* ***which were admittedly on credit*** *and this was to enable the petitioner to run the industrial unit held by him. In this manner his case is covered under Section 3(1) (a)* read with Section 2(b) of the Act. In the instant case also as a result of mutual contract between the parties delivery of goods were made to the petitioner by respondent company. The petitioner obtained huge quantity of raw materials without making payment and thus, the respondent company is claiming the price of the goods sold to the petitioner by way of financial assistance. The case of the petitioner is therefore, also covered under Section 3(1)(a) read with Section 2(b) of the Act.”

(emphasis added)

13. We are completely unable to accept the view taken by

the High Court. If the appellant company was *purchasing* wire rods as raw material from the Corporation we fail to see how the sale of the goods would become financial assistance rendered to the appellant unless it is shown that the supply of the goods was as a loan or grant or by way of hire purchase in terms of some agreement. We are, therefore, unable to follow the observation by the High court that "Thus the raw materials, that is, wire rods, were sold, to the petitioner by the respondent company by way of financial assistance". We also find no basis for the observation made by the High Court that "it is, however, **admitted** that respondent company (sic Corporation) had been supplying raw materials to the petitioner-company for carrying all its business" and further that the goods supplied "were *admittedly* on credit". There is no such admission by the appellant. On the contrary the case of the appellant is that it used to purchase wire rods from the Corporation on payment of price and it made payment for all the purchases from the Corporation.

14. We think that the High Court has stretched the meaning of "financial assistance" as defined in section 2 and the scope of section 3 of the Act beyond reasonable limits. From a bare reading of section 3 it is evident that the dues must arise from an agreement to which the person from whom recovery is to be made is a party. Sub clause (a) of sub-section 1 then enumerates the kinds of agreement under which the transaction should have taken place. It needs also to be borne in mind that in the scheme of the Act there is no provision for any adjudication. Once there is any default under an agreement, the designated authority is authorized to issue a recovery certificate and send it to the Collector who is obliged to recover the certificate amount together with interest from the certificate debtor as arrears of land revenue. At no stage the certificate debtor is given an opportunity to put up his case. Such being the legal position, the recovery certificate must be based on a tangible agreement and it should even *prima facie* appear that the dues arise from a breach of the terms of the agreement. A

proceeding under section 3 of the Act cannot be sustained by piling up assumptions in favour of the certificate holder and against the judgment debtor.

15. In the present case it is evident that the dues of which recovery is sought by the impugned certificates do not pertain to any loan, advance or grant given to the appellant or to any credit concerning any hire purchase of goods sold to the appellant by the Corporation under any agreement, express or implied. The dues do not relate to any financial assistance.

16. We also cannot overlook the fact that in this case the so called supplies were not even made in the normal course of business. A reference to the FIR makes it clear that according to the Corporation the goods were taken away by the appellant in a criminal action constituting a number of offences under the Penal Code. The U.P. Public Moneys (Recovery of Dues) Act, 1972 was clearly not intended to recover the goods or the monetary value of goods taken away in course of theft or dacoity or lost as a result of dishonest appropriation or any other alleged criminal action.

17. For the reasons discussed above, we are of the view that in the facts of this case the two impugned recovery certificates are quite illegal and untenable and we are unable to sustain the High Court order coming under appeal.

18. There is another point and though it was not raised before the High Court, we think proper to mention it since it is crucial to the proceeding under section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972. In a decision by this court in *Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and Others*, (2003) 2 SCC 455, it was held that after the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, recourse cannot be taken for recovery of dues to the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 because the U.P. Act does not find mention in section 34(2) of the Recovery of

Debts Due to Banks and Financial Institutions Act, 1993.

19. For all these reasons the order of the High Court is set aside and the impugned recovery certificates are quashed.

20. It is made clear that this judgment shall not in any way affect the criminal case instituted against the Directors of the appellant company and it will proceed on its own merits and in accordance with law. This judgment shall also not stand in the way of the respondent Corporation in seeking recovery of its claims from the appellant by any other means duly sanctioned by law.

21. In the result the appeal is allowed but with no order as to costs.

K.K.T. Appeal allowed.

SPECIAL LAND ACQUISITION OFFICER

v.

KARIGOWDA & ORS.

(Civil Appeal No. 3838 of 2010 etc.)

APRIL 26, 2010

[R.V. RAVEENDRAN AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894:

ss. 23 and 24 – Fair market value – Of acquired land – In compulsive acquisition – Determination of – Grant of compensation – Held: For determining the market value, the relevant consideration would be the value of land with its peculiar advantages and disadvantages with reference to commercial value – Other consequential right, legal or commercial, which remotely flows from an agricultural activity will not be treated as a relevant consideration – The computation of compensation has to be in terms of ss. 23 and 24 – Only statutory benefits in terms of ss. 23 (1-A) and 23 (2) would be available to the claimant – Manufacture of silk which is the result of the silk worm fed by mulberry leaves is not an agricultural activity, but sericulture – This activity would fall in the domain of manufacturing and commercial activity and is not directly covered under s. 23.

ss. 23 and 24 – Interpretation of – Held: The court should apply the principle of literal or plain construction to these provisions – In view of the scheme of the Act, it will not be appropriate either to apply the rule of strict construction or too liberal construction to the provisions of the Act –Interpretation of statutes.

ss. 4 and 48 – Land acquisition – Land taken in possession prior to issuance of notification u/s. 4 – Grant of interest for the period prior to the notification – Held: Grant of

interest for the period prior to notification not permissible – However, for such period, court can direct the Collector to examine the extent of rent or damage – s. 48 would come to the aid of claimants.

Land Acquisition:

Compensation for land acquisition – Methodology for computation of – In compulsive acquisition – High Court adopting Capitalization of Net Income Method, negating the Sales Statistics Method by taking instances of adjacent villages adopted by the Land Acquisition Officer – Held: Adoption of method of Capitalization and multiplying the same by 10, is without the support of evidence, hence inconsequential – Sale instances of adjacent villages can be made basis for determining the fair market value – On facts, the instances considered by Land Acquisition Officer are relevant instances – Claimants are entitled to increase at the rate of 15% P.A. compounded, in view of increasing trend in sale price and since the land was used for production of mulberry crops which had restrictive use in the manufacturing, commercial or industrial activities – The Court is entitled to apply some reasonable guess work to balance the equities and fix just and fair market value in terms of parameters u/s. 23 of Land Acquisition Act – In the peculiar facts of the case, claimants are given higher compensation – What could be capitalized was the value of mulberry leaves used for sericulture and not the value of silk cocoons – Land Acquisition Act, 1894 – ss. 23 and 24.

Compulsive acquisition – Power of compulsive acquisition has an inbuilt duty and responsibility on the State to pay just and fair compensation without delay.

Interpretation of Statutes:

Legislative intent – Held: Legislative intent needs to be noticed for beneficial and proper interpretation of the

provisions in the light of the scheme underlying the provisions of the Statute.

Literal/Plain construction – The plain words require no construction – However, whether the words are plain or ambiguous can be determined by studying them in their context.

Interpretation – Guiding principles – Held: Interpretation can be literal or functional – Literal interpretation not to go beyond litera legis – Functional interpretation can make some deviation to the letter of law – The interpretation is best which makes the textual interpretation match the context – A statute is best interpretated when the purpose of enactment are known – Where statutory provision confers rights and also states mandatory or implied conditions, such conditions are relevant for interpretation – Exercise of statutory power in breach of the express of implied conditions will be illegal, if the conditions breached are mandatory.

Evidence:

Onus to prove – Land acquisition – Entitlement to receive higher compensation – Held: Onus to prove entitlement to receive higher compensation is on the claimants – But it cannot be said that there is no onus on the State – Land Acquisition.

Administration of Justice:

For proper administration of justice, State advised to act fairly and for benefit of public at large – Decisions of the State should be such as to avoid unnecessary litigation.

Maxim:

'Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium' – Applicability.

The questions for consideration before this Court were whether manufacturing or commercial activity carried on by the agriculturist, either himself or through third party, as a continuation of the agricultural activity, that is, using the yield for production of some other final product can be the basis for determining the fair market value of the acquired land, within the parameters specified u/s. 23 of the Land Acquisition Act, 1894 in the facts of the present case; and that whether the claimants were entitled to interest for the period before the date of notification u/s. 4 of the Act, as the possession of the land was taken over, before the acquisition notification.

Partly allowing the appeals, the Court

HELD: 1.1. The provisions of the Land Acquisition Act are self-contained and it is a code in itself providing for a complete procedure and steps which are required to be taken by the authorities concerned, for acquisition of land and payment of compensation. Keeping in view the scheme of the Act, it will not be appropriate either to apply the rule of strict construction or too liberal construction to its provisions. The power of compulsive acquisition has an inbuilt element of duty and responsibility upon the State to pay the compensation which is just, fair and without delay. Thus, it will be appropriate to apply the rule of plain interpretation to the provisions of this Act. [Para 20] [192-G-H; 193-E-G]

1.2. Interpretation is guided by the spirit of the enactment. Interpretation can be literal or functional. Literal interpretation would not look beyond *litera legis*, while functional interpretation may make some deviation to the letter of the law. Unless, the law is logically defective and suffers from conceptual and inherent ambiguity, it should be given its literal meaning. Where the law suffers from ambiguity, it is said "interpretation

must depend upon the text and context. They are the basis of the interpretation. If the text is the texture, context is what gives it colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the context. A statute is best interpreted when we know why it was enacted." [Para 22] [195-F-H; 196-A]

Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors. **(1987) 1 SCC 424, referred to.**

Principles of Statutory Interpretation by Justice G.P. Singh, **9th Edition 2004, Page 15, referred to.**

1.3. Where a statutory provision confers rights and also states mandatory or implied conditions which would have to be satisfied before the claim, can culminate into a relief, such considerations or conditions are relevant for the purposes of interpretation as well. A power conferred by the statute, often contains an express condition for its exercise and, in absence of, or in addition to the express condition, there are also implied conditions for exercise of power. Exercise of statutory power in breach of express or implied conditions will be illegal, if the conditions breached are mandatory. This principle, to a large extent, is applicable to exercise of rights arising from beneficial legislations, when an owner claims benefits under statutory provisions, it is for him to show that what is contemplated under the conditions attached thereto has been satisfied, particularly when such legislative intent is clear from the bare reading of the provisions. [Para 24] [196-D-G]

1.4. Sections 23 and 24 of the Act provide a complete scheme which can safely be termed as statutory guidelines and factors which are to be considered or not to be considered by the Court while determining the market value of the acquired land. These provisions

provide a limitation within which the court has to exercise its judicial discretion while ensuring that the claimants get a fair market value of the acquired land with statutory and permissible benefits. Keeping in view the scheme of the Act and the interpretation which these provisions have received in the past, it is difficult even to comprehend that there is possibility of providing any straitjacket formula which can be treated as panacea to resolve all controversies uniformly, in relation to determination of the value of the acquired land. This essentially must depend upon the facts and circumstances of each case. [Para 21] [194-B-F]

1.5. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed. [Para 26] [197-F-G]

D. Saibaba v. Bar Council of India and Anr. **AIR 2003 SC 2502, referred to**

Hutton v. Philips **45 Del 156, referred to**

Principles of Statutory Interpretation by Justice G.P. Singh, **9th Edition 2004, Page 51, referred to**

1.6. It will not be permissible for the authorities to go beyond the scope and purview of the provisions or the pre-requisites stated in ss. 23 and 24 for determination of the fair market value of the land. Compensation has to be determined strictly in accordance with the provisions. The matters which are to be governed by the terms of Section 24 of the Act cannot be taken into consideration by extending discretion referable to the matters which should be considered by the courts in terms of Section

23 of the Act. The court should apply the principle of literal or plain construction to these provisions, as the Legislature in its wisdom has not given to the court absolute discretion in matter relating to awarding of compensation but has intended to control the same by enacting these statutory provisions. [Para 25] [197-B-E]

1.7. The expression "Such market value" as occurring in Section 23(2), is an expression which must be read *ejusdem generis* **to the provisions of Section 23(1) of the Act, as they alone would provide meaning and relevancy to the guidelines which are to be taken into consideration by the courts for determining the market value of the land. The expression 'shall' as occurs in Section 23(1) can hardly be construed as 'may' giving an absolute discretion to the court to take or not to take into consideration the factors stated in Section 23(1) of the Act. The expression 'shall' thus would have to be construed as mandatory and not directory. It is more so, keeping in view the language of Section 24 of the Act, which mandates that the court shall not take into consideration the matters indicated in firstly to eighthly of Section 24 of the Act. This legislative intent needs to be noticed for beneficial and proper interpretation of these provisions in the light of the scheme underlining the provisions of the Act. [Para 28] [199-C-F]**

1.8. The expression 'such market value' used in Sections 23(1-A) and 23(2) respectively obviously would mean and refers to the market value determined in terms of Section 23(1) of the Act. "Such market value" is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser. It is the price which would be payable to a person after the complete appraisal of land with its peculiar advantages and disadvantages being estimated with reference to commercial value. Thus, other consequential right, legal

or commercial, which remotely flows from an agricultural activity will not and should not be treated as a relevant consideration. The potentiality has to be directly relatable to the capacity of the acquired land to produce agricultural products or, its market value relatable to the known methods of computation of compensation. [Paras 29, 30 and 35] [199-F-H; 200-A-B; 201-G-H]

Municipal Council of Colombo v. Kuna Mana Navanna Suna Pana Letchiman Chettiar **AIR (34) 1947 PC 118, referred to**

1.9. The extent of compensation would always depend on the facts and circumstances of the given case and it is not possible to set any absolute legal principle as a panacea which uniformly will be applicable or capable of being applied as a binding precedent *dehors* the facts of a given case. The discretion of the court, therefore, has to be regulated by the legislative intent spelt out under these provisions. The computation of compensation has to be in terms of Sections 23 and 24 of the Act and that too from the date of issuance of the Notification under Section 4 of the Act. It is only the statutory benefits which would be available in terms of Sections 23(1-A) and 23(2) of the Act. [Paras 31 and 32] [200-C-F]

Mohammad Raofuddin v. The Land Acquisition Officer **(2009) 5 SCR 864, relied on**

Nelson Fernandes and Ors. v. Special Land Acquisition Officer, South Goa and Ors. **(2007) 9 SCC 447, referred to**

1.10. The purpose is not to connect the acquisition to remote factors which may have some bearing or some connection with the agricultural activity being carried on, on the land in question is neither permissible nor prudent, as it would be opposed to the legislative intent contained

under the provisions of Sections 23 and 24 of the Act. [Para 36] [202-C-E]

State of Orissa v. Brij Lal Misra and Ors. **(1995) 5 SCC 203, relied on.**

1.11. There was no evidence led by the claimants to substantiate and justify their claim with reference to the alleged silk cocoons being an agricultural activity, the onus being upon them. There was a presumption in the mind of the court as well as the claimants that, the manufacture of silk thread by the stated process of boiling silk cocoons which is the result of the silk worm being fed by mulberry leaves is an agricultural activity. This presumption is contrary to law and the literature referred by the expert body as well. [Para 48] [206-A-C]

1.12. Activity of agriculture cannot be equated to sericulture. While agricultural activity is the growing of mulberry crop and disbursing it, manufacture of silk thread from silk worms who are fed with mulberry leaves, and then converted through the specified process into cocoons and ultimately silk thread and its sale is an activity of sericulture which primarily falls in the domain of manufacturing and commercial activity. This activity of producing silk from silk worms for which mulberry crop is used as food, therefore, cannot be an activity directly covered under the provisions of Section 23 of the Act. Even by the process of judicial interpretation, it will amount to drawing an impermissible inference that sericulture is a part of agricultural activity, that too to the extent to make it a permissible consideration under the relevant provisions of the Act. [Para 49] [206-D-G]

K. Lakshmanan and Co. and Ors. v. Commissioner of Income Tax, **(1998) 9 SCC 537, relied on**

1.13. The basic error of law to which the courts below

have fallen is that ultimate manufacturing of silk thread under the nomenclature of cocoons has been treated as a purely agricultural activity relevant for determination of fair market value of the land in terms of Section 23 of the Act. The courts have treated the cocoons as the crop and not mulberry leaves. [Paras 53 and 55] [208-A-B-E]

2. The onus to prove entitlement to receive higher compensation is upon the claimants. The claimant, can discharge the onus while placing and proving on record sale instances and/or such other evidences as they deem proper, keeping in mind the method of computation for awarding of compensation which they rely upon. The onus being primarily upon the claimants, they are expected to lead evidence to revert the same, if they so desire. It cannot be said that there is no onus whatsoever upon the State in such reference proceedings. The court cannot lose sight of the facts and clear position of documents, that obligation to pay fair compensation is on the State in its absolute terms. Every case has to be examined on its own facts and the Courts are expected to scrutinize the evidence led by the parties in such proceedings. [Para 21] [194-E-G; 195-C-D]

Basant Kumar and Ors. v. Union of India and Ors. **(1996) 11 SCC 542;** *Gafar v. Moradabad Development Authority* **(2007) 7 SCC 614, relied on.**

3.1. The methodology adopted by the courts as well as the extent of compensation awarded to the claimants cannot be upheld. While adopting the criteria of capitalization and multiplying the same by 10, the finding of the High Court is clearly not supported by any cogent evidence on record and thus the question of applying the multiplier to a figure which has been arrived at, without any evidence would be inconsequential. There is no direct and appropriate evidence to show any nexus to support the claim of the claimants. Thus, cocoons cannot

be considered as a crop even as per literature submitted by the respective parties. Therefore the finding recorded is unsustainable even on appreciation of evidence. [Paras 54, 57 and 58] [208-B-C; 209-E-F]

3.2. The courts have been exercising their discretion by adopting different methods, viz. Sales Statistics Method, Capitalization of Net Income Method and Agriculture Yield Basis Method. Normally where the compensation is awarded on agricultural yield or capitalization method basis, the principle of multiplier is also applied for final determination. These are broadly the methods which are applied by the courts with further reduction on account of development charges. In some cases, depending upon the peculiar facts, this Court has accepted the principle of granting compound increase at the rate of 10% to 15% of the fair market value determined in accordance with law to avoid any unfair loss to the claimants suffering from compulsive acquisition. However, this consideration should squarely fall within the parameters of Section 23 while taking care that the negative mandate contained in Section 24 of the Act is not offended. How one or any of the principles is to be applied by the courts, would depend on the facts and circumstances of a given case. [Paras 60 and 61] [210-C-D; 211-C-E]

Faridabad Gas Power Project, N.T.P.C. Ltd. and Ors. v. Om Prakash and Ors. **2009 (4) SCC 719;** *Shaji Kuriakose and Anr. v. Indian Oil Corp. Ltd. and Ors*. **AIR 2001 SC 3341;** *Ravinder Narain and Anr. v. Union of India* **2003 (4) SCC 481;** *Union of India and Anr. v. Smt. Shanti Devi and Ors*. **1983 (4) SCC 542;** *Executive Director v. Sarat Chandra Bisoi and Anr.* **2000 (6) SCC 326;** *Nelson Fernandes and Ors. v. Special Land Acquisition Officer, South Goa and Ors.* **(2007) 9 SCC 447, referred to**

3.3. In the present case, the court has declined to

accept the method adopted by the Collector for granting compensation to the claimants for the reason that the SLAO ought not to have taken recourse to the method of sale statistics. It was further recorded that no sale instances of the village in question, three years prior to 2002 were available and instances of adjacent village should not have been taken into consideration. Instead, the market value should have been calculated by adopting capitalization method and no reason was stated as to why this method was not applied. [Para 62] [211-F-H; 212-A]

3.4. The Reference Court fell in error of law in stating that the lands of the adjacent or nearby villages could not have been taken into consideration. It is a settled principle of law that lands of adjacent villages can be made the basis for determining the fair market value of the acquired land. The evidence tendered in relation to the land of the adjacent villages would be a relevant piece of evidence for such determination. Once it is shown that situation and potential of the land in two different villages are the same then they could be awarded similar compensation or such other compensation as would be just and fair. [Paras 62 and 64] [212-B-C, F-G; 213-A-B]

Kanwar Singh and Ors. v. Union of India **JT 1998 (7) SC 397;** *Union of India v. Bal Ram and Anr.* **AIR 2004 SC 3981;** *Kanwar Singh and Ors. v. Union of India* **AIR 1999 SC 317, relied on**

Kantaben Manibhai Amin and Anr. v. The Special Land Acquisition Officer, Baroda **AIR 1990 SC 103, referred to**

3.5. The sale instances can be taken into consideration by the Court and benefit of the highest instance can be granted to the claimants in accordance with law in fixing the market value of the acquired land. Whatever benefit accrues to the claimants from the

record produced and proved by the respondents, cannot be denied to them just because they have not produced evidence by way of sale instances. [Para 71] [218-E-F]

3.6. The sale instances which were taken into consideration by the SLAO, and which were part of the reference file show that there was an increasing trend in the sale price of the land in these villages. In view of the date of the notification u/s. 4 shows that all the sale instances of the adjacent comparable lands are in proximity of time to the date of notification u/s. 4 of the Act. Since the sale instances relied upon are nearly around 1 to 2 ½ years prior to the date of notification, they are relevant considerations and, therefore, the claimants are entitled to an increase at the rate of 15% per annum compounded. [Para 72] [218-G; 219-C-D]

3.7. The increase is justified and equitable – firstly, on the ground that there was increasing trend in the sale price of that land and secondly, the lands acquired were being used by the agriculturists for production of mulberry crops which had a restrictive use in the manufacturing, commercial or industrial activities i.e. feeding the silk worms which are ultimately used for production of silk thread. The court cannot use this admitted restricted use to the disadvantage of the land owners and some benefit should be given to them while balancing the equities in accordance with law. The concept of fair compensation payable for the acquired land is embodied in the Act itself, particularly in view of *secondly* and *fifthly* of Section 23 of the Act. In fact, the State Government itself has given some additional compensation to the claimants for mulberry crops which were standing at the time of submerging. This stand of the State Government is reasonable and fair. [Para 73] [219-E-H; 220-A]

3.8. The claimants, by leading definite evidence have

shown on record that the lands in question are not only lands having regular source of irrigation through the backwaters but otherwise are also lands superior to the other garden lands used for ordinary agricultural activities. The fields in question are being used exclusively for growing mulberry crops. Mulberry leaves are the only and the specified food for cocoons. The agricultural purpose for which the fields in question are being used is a special purpose and the crop so grown is again used for a specific commercial purpose to which there is no other alternative. [Para 73] [220-E-G]

3.9. In the present cases, the claimants have not only lost their agricultural land but they have also been deprived of seasonal income that was available to them as a result of sale of mulberry leaves. Deprivation of livelihood is a serious consideration. The court is entitled to apply some kind of reasonable guess work to balance the equities and fix just and fair market value in terms of the parameters specified under Section 23 of the Act. The SLAO has ignored both these aspects firstly providing of annual increase, and secondly, giving some weightage to the special agricultural purpose and the purpose for which the mulberry crop had to be utilized. The claimants have not proved and produced sale instances. They have also not produced on record any specific evidence to justify the compensation awarded to them by the Reference Court and/or the High Court. There is hardly any evidence, much less a cogent and impeccable evidence to support the increase on the basis of net income capitalization method. [Para 73] [220-G-H; 221-A-C]

3.10. It is a settled rudiment of law that the Court, in given facts and circumstances of the case and keeping in mind the potentiality and utility of the land acquired, can award higher compensation to ensure that injustice

is not done to the claimants and they are not deprived of their property without grant of fair compensation. While adopting the average sale method as the formula for awarding compensation to the claimants, in the peculiar facts and circumstances of the case and the fact that the land is being compulsorily acquired, the claimants should be awarded a higher compensation. The compensation at the rate of Rs. 2,30,000/- per acre for the wet land and at the rate of Rs. 1,53,400/- per acre for the dry land would be just and fair compensation and would do complete justice between the parties. As far as claimants are concerned, they have not produced and proved any sale instance and they have not even brought on record any specific evidence to justify their claims relatable to and based upon net income capitalization method. In fact, the claimants have failed to discharge their onus fully and satisfactorily. [Para 73] [221-D-H; 222-A]

Land Acquisition Officer, A.P. v. Kamadana Ramakrishna Rao **(2007) 3 SCC 526, referred to**

3.11. The determination of the market value by capitalization of yield method will depend upon the agricultural yield, that is, value of agricultural produce less expenditure for growing them, and not with reference to a further sericultural activity by using the agricultural produce. Therefore, what could be capitalized for determination of market value was the value of mulberry leaves used for sericulture and not the value of silk cocoons produced by feeding such mulberry leaves to the silkworms. The yield of silk cocoons is the result of further human effort and industry, value of which obviously cannot be capitalized for the purpose of arriving at the market value of the agricultural land. [Para 74] [222-B-D]

3.12. Keeping in mind the facts and circumstances of the case, it will also be just and fair to adopt some

liberal approach with some element of guess work to provide the claimants with just and fair market value of the land in question. The entire land including the village in question and all other villages was acquired for the purpose of submerging the lands because of the water coming from the Hemavathi Dam. It will be just, fair, equitable and in consonance with Sections 23 and 24 of the Act that the market value of the land as on 04.04.2002 can safely be taken as Rs. 2,30,000/- per acre in the case of garden land and, applying the accepted principle of reducing the said compensation in the case of dry lands by one third, the rate will be Rs.1,53,400/- per acre in the case of dry land keeping in view the peculiar facts and circumstances of the present case and the evidence on record. [Para 75] [222-G-H; 223-A-B]

Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N.C. Budharaj (deceased) by Lrs. and Ors., **(2001) 2 SCC 721;** *Satinder Singh and Ors. v. Umrao Singh and Anr.* **AIR 1961 SC 908, distinguished**

4. The Reference Court as well as the High Court could not have granted any interest under the provisions of the Act, for a date anterior to the issuance of Notification u/s. 4 of the Act. The provision of the Act clearly lays down the procedure required to be followed while taking possession of the acquired land. The words "from the date on which he took the possession of the land" occurring in Section 20 would mean lawful taking of possession. Once notification under Section 4 (1) of the Act has been issued and the acquisition proceedings culminated into an award in terms of Section 11, then alone the land vests in the State free of any encumbrance or restriction in terms of provisions of Section 16 of the Act. The Court, in situations where possessions has been taken prior to issuance of notification under Section 4(1) of the Act, can direct the Collector to examine the extent of rent or damage that the owners of land would be

entitled to. The provisions of s. 48 of the Act would come to aid and the court would also be justified in issuing appropriate direction. However, the Collector is directed to examine the question of payment of rent/damages to the claimants, from the period when their respective lands were submerged under the back water of the river, till the date of issuance of the Notification u/s. 4(1) of the Act, from which date, they would be entitled to the statutory benefits on the enhanced compensation. [Paras 77 and 78] [224-B-D; 227-E-H; 228-A-C]

Shree Vijay Cotton and Oil Mills Ltd. v. State of Gujarat **(1991) 1 SCC 262;** *R.L. Jain (D) by Lrs. v. DDA and Ors.* **2004 (4) SCC 79, relied on**

5. The Government Authorities are expected to advert to the factors relating to the pendency of various appeals including those before the Reference Court and take steps at the earliest to remedy the legal grievances raised by the claimants at different levels of justice administration system. Despite its might, the State is expected to be a responsible and reluctant litigant as there is obligation upon the State to act fairly and for the benefit of the public at large. It will be in harmony with the principle of proper administration that State also takes decisions which would avoid unnecessary litigation. An established maxim *"Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium,"* **casts a duty upon the court to bring litigation to an end or at least endure that if possible, no further litigation arises from the cases pending before the Court in accordance with law. This doctrine would be applicable with greater emphasis where the judgment of the Court has attained finality before the highest court. All other Courts should decide similar cases particularly covered cases, expeditiously and in consonance with the law of precedents. There should be speedy disposal of cases particularly where**

the small land owners have been deprived of their small land-holdings by compulsive acquisition. Any unnecessary delay in payment of the compensation to them would cause serious prejudice and even may have adverse effect on their living. In these circumstances, the State authorities are directed and the courts are requested, where cases are pending arising from the same notification, to dispose of the pending proceedings without any further delay. [Para 79] [229-B-H]

Case Law Reference:

(1996) 11 SCC 542	**Relied on.**	**Para 21**
(2007) 7 SCC 614	**Relied on.**	**Para 21**
(1987) 1 SCC 424	**Referred to.**	**Para 22**
AIR 2003 SC 2502	**Referred to**	**Para 26**
45 Del 156	**Referred to**	**Para 27**
AIR (34) 1947 PC 118	**Referred to**	**Para 29**
(2007) 9 SCC 447	**Referred to**	**Paras 33 and 60**
(2009) 5 SCR 864	**Relied on**	**Para 34**
(1995) 5 SCC 203	**Relied on.**	**Para 39**
(1998) 9 SCC 537	**Relied on**	**Para 50**
2009 (4) SCC 719	**Referred to.**	**Para 60**
AIR 2001 SC 3341	**Referred to.**	**Para 60**
2003 (4) SCC 481	**Referred to.**	**Para 60**
1983 (4) SCC 542	**Referred to.**	**Para 60**
2000 (6) SCC 326	**Referred to.**	**Para 60**
1998 (7) SC 397	**Relied on.**	**Para 65**

AIR 2004 SC 3981	**Relied on.**	**Para 65**
AIR 1999 SC 317	**Relied on.**	**Para 66**
AIR 1990 SC 103	**Referred to**	**Para 70**
(2007) 3 SCC 526	**Referred to**	**Para 73**
AIR 1961 SC 908	**Distinguished**	**Para 76**
(2001) 2 SCC 721	**Distinguished**	**Para 76**
(1991) 1 SCC 262	**Relied on.**	**Para 77**
2004 (4) SCC 79	**Relied on.**	**Para 77**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3838 of 2010.

From the Judgment & Order dated 23.1.2008 of the High Court of Karnataka at Bangalore in MFA No. 8544 of 2007.

WITH

C.A. Nos. 3839, 3840-3841, 3842, 3843, 3844, 3845, 3848, 3849, 3850-63 of 2010.

Basva Prabhu Patil, Brijesh Kalappa, Divya Nair, N. Ganpathy, Anitha Shenoy and Rashmi Nandakumar for the Appellant.

Shanth Kr. V. Mahale, Harish S.R. Hebbar, Rajesh Mahale, M. Puttegowda and Somachari for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. All the above appeals under Article 136 of the Constitution of India raise a common question of law based on somewhat similar facts and are directed against different judgments of the Karnataka High Court and the judgment of the Principal Civil Judge (Senior Division) and JMFC,

Srirangapatna (hereinafter referred to as the "Reference Court").

3. Civil Appeals arising out of SLP (C) Nos. 20767 of 2008 and 21730 of 2008 are directed by the Special Land Acquisition Officer (for short the 'SLAO') and the Managing Director Irrigation Board (for short the 'Board') respectively, against the judgment and order dated 23rd January, 2008 passed by the High Court in MFA No. 8544 of 2007, whereby the High Court enhanced the compensation of the acquired land to Rs.5,00,000/- per acre for the wet land (garden land).

4. Civil Appeals arising out of SLP (C) Nos. 31096-31109 of 2009 are directed against the judgment of the High Court dated 22nd February, 2008 in MFA Nos. 6924 of 2007 (LAC) C/W Nos. 6925/2007, 7289/2007, 7290/2007, 7291/2007, 7292/2007, 7294/2007, 8541/2007, 8543/2007, 8545/2007, 8546/2007, 8549/2007, 8551/2007 and 8553/2007 (LAC), whereby the High Court while relying upon its judgment in the earlier cases granted the compensation at a sum of Rs.5,00,000/- per acre for wet land (garden land) and Rs.2,53,750/- per acre for dry land.

5. Appeal arising out of SLP (C) No.31169 of 2008 is directed against the judgment of the Reference Court dated 16th March, 2007 in LAC No. 219/2006, vide which the learned Court granted compensation at Rs.2,92,500/- per acre in respect of wet lands (garden land).

6. In other words, we will be dealing with the above appeals as well as other connected appeals, relating to the same acquisition, preferred by the State against the judgment of the High Court as well as that of the Reference Court. At the very outset, we may also notice that objection was raised with regard to the maintainability of the appeal against the judgment passed by the Reference Court.

7. Simple but an interesting question of law that falls for consideration of the Court in the present appeals, relates to the

ambit and scope of Section 23 of the Land Acquisition Act, 1894 (for short 'the Act') – whether, manufacturing or commercial activity carried on by the agriculturist, either himself or through third party, as a continuation of the agricultural activity, that is, using the yield for production of some other final product can be the basis for determining the fair market value of the acquired land, within the parameters specified under Section 23 of the Act, in the facts of the present case?

8. The learned counsel appearing for the parties, have addressed varied arguments in support of their respective cases while primarily focusing their submissions on the above-referred question of law.

9. It will be appropriate to refer to the facts giving rise to the present appeals at the very outset. As the facts in all other connected appeals are more or less similar, thus, it will not be necessary for us to refer to the facts of each case in detail. For the purposes of brevity and in order to avoid repetition, we will be referring to the facts in the civil appeals arising from SLP(C) Nos. 20767/2008 and 21730/2008.

10. The respondents in these appeals are the owners of the lands varying between 2 to 48 guntas (total acquired land measured 146 acres and 7 guntas relating to nearly 419 claimants) situated in Village Sanaba, Chinakurali Hobli, Pandavapura. These lands got submerged under the backwaters of Tonnur tank in the year 1993 due to construction of Hemavathi Dam. The water from the dam which was canalized to the tank resulted in submerging of the land belonging to different respondents. The physical possession of the land, belonging to the owners was taken on or about 24th October, 1996 and 26th December, 1999 respectively. However, the notification under Section 4(1) of the Act came to be issued on 4th April, 2002. The crops belonging to the owners were damaged. The SLAO passed an award dated 28th August, 2003, fixing the market value of the wet lands at the rate of Rs.90,640/- per acre and for dry land at the rate of

Rs. 37,200/- with statutory benefits. Other awards were made by the SLAO on different dates.

11. Aggrieved by these awards passed by the SLAO, the claimants sought reference to the Civil Court for determination of the compensation. The Reference Court vide its judgment and award dated 16th March, 2007 enhanced the compensation payable to the claimants to Rs.2,92,500/- per acre for the wet lands (garden land). In other cases Rs.1,46,250/- for dry land (lightly irrigated) and Rs.1,20,000/- for dry land (without mulberry crop) were awarded. This compensation was awarded with other statutory benefits. Still, the claimants felt dissatisfied and preferred appeals before the High Court. These appeals were disposed off by the High Court vide its judgment dated 23rd January, 2008, enhancing the compensation payable to the claimants at the rate of Rs. 5,00,000/- per acre for wet/garden land (in other cases) Rs.2,53,750/- per acre for dry lands. The High Court also awarded interest on enhanced compensation from the date of their submergence in the backwaters of Tonnur Tank. Aggrieved by the judgment of the High Court, the SLAO on behalf of the Government filed the present appeals against its judgment.

12. Against the judgment of the Reference Court, directly an appeal had been filed by the Board before this Court. This appeal arises from SLP (C) No. 31169 of 2008, wherein the judgment of the Reference Court, granting enhancement of the awarded compensation, in view of the judgment of the High Court, has been challenged. Usefully, it can also be noticed at this stage itself, that when the claimants had filed appeals for further enhancement before the High Court in other matters, the State Government had neither filed any appeal against the judgment of the Reference Court nor any cross objections. This fact has duly been noticed by the High Court in the judgment under appeal. The challenge to the judgment of the High Court is primarily on the ground that there was no evidence on record before the High Court which would justify enhancement of

compensation by more than five times to the compensation awarded by the Collector. The findings of the High Court besides being based upon no evidence are contrary to the very spirit of the provisions of Section 23 of the Act. The contention, inter alia, raised is that the judgment of the High Court is erroneous and contrary to law as the High Court could not have taken into consideration the ultimate manufactured product i.e. silk thread from silk cocoon in contra-distinction to the agricultural product i.e. mulberry crop in determining the fair market value of the land. In the submission of the appellant, another pure question of law which has been raised is that the High Court could not have granted interest on the enhanced compensation, from the date the land belonging to the claimants submerged in the backwaters of Tonnur Tank, as such benefit in terms of Section 23(1A) and Section 23(2), can only be granted from the date of notification issued under Section 4 of the Act.

13. Another contention raised on behalf of the appellant is that the High Court has allowed a uniform enhanced compensation to be paid to the claimants without drawing any distinction between wet and dry lands. Such findings of the Courts below suffer from a palpable error apparent on the face of the record and the impugned judgment is thus liable to be set aside. With reference to another ancillary legal issue, it has been emphasized on behalf of the appellants, that the claimants do not have any license as required under Section 4 of the Mysore Sales (Control) Act, at least none was produced before the Reference Court and thus the compensation awarded on the alleged ground, that they were carrying on the activity of sericulture resulting in manufacture of silk thread ought not to be the foundation for grant of compensation.

14. According to learned counsel for the respondents-claimants, the Court below and the High Court have correctly appreciated the evidence and taken the view that the crops grown by claimant are shown as Mulberry crops and the

documentary evidence clearly shows that about 250 to 400 silk cocoon clusters can be obtained in one crop in wet land. 100 silk cocoon clusters weigh about 45 to 50 kgs. in wet lands and 30 to 35 kgs. in other lands depending upon rain. The average price of the silk cocoons per kg. would be Rs. 100/- to Rs.150/-. Karigowda, PW-1 had submitted these figures and the Expert report, particularly, Exh. P.9 and P.10 showing the average yield of silk cocoons per crop. The Reference Court, therefore, rightly took into consideration the evidence and computed the income after deducting 50 per cent of the income towards cost of cultivation as per the judgment of this Court in *State of Gujarat & Ors. vs. Rama Rana and Ors.* [AIR 1997 SC 1845]**.** While applying the capitalization method and multiplier of 10, the Reference Court had granted compensation to the claimants at Rs. 2,92,500/- for the wet land (garden land) which was enhanced to Rs. 5,00,000/- by the High Court. According to the respondent-claimants, there was sufficient evidence on record including the expert evidence to ignore the method of sale statistics and determine compensation by applying the capitalization method.

15. As is evident from the above stated facts, the principal controversy between the parties is with regard to the method adopted for computation of compensation payable to the claimants and the quantum thereof. The appellant has raised the argument that the method of computation adopted by the Reference Court as well as the High Court is impermissible in law. The Court cannot take into consideration the commercial activity which may result from, and be indirectly incidental to, the agricultural activity particularly when both of them are carried on independent of each other. This being the main controversy, it will be necessary for us to refer to the methodology adopted by the Reference Court as well as the High Court while awarding the compensation impugned in the present appeals.

16. We have already indicated that we would be referring to the facts of the two appeals except where it is necessary to

refer to particular facts of another appeal. The Reference Court as well as the High Court noticed that the State should be fair and reasonable in compensating the uprooted agriculturists as well as the fact that no sale instances from Village Sanaba were available prior to 2002, though sale statistics of adjoining villages were produced before the Court. In this backdrop, they awarded the compensation on the basis of capitalization method and discussion in that regard can usefully be reproduced at this stage.

(Reference Court)

"13. Keeping the evidence of P.W.1 in mind, I have gone through the documents produced by the claimant who got marked RTC as per Ex. P.2 to P.7, award Thakthe as per Ex.P.8, yield notification and price list of Mulberry crop as per Ex.P.9 and P.10 and estimation as per Ex.P.11. On perusal of the documents relied by the claimant, it is noticed that, in the RTC extracts, the nature of crops being grown by the claimant is shown as Mulberry. The production of RTC Extracts as per Ex. P.2 to P.7 supports the say of PW.1 with regard to growing of mulberry crops over the lands in question. Further the production of Ex.P.9 and P.10 goes to show that, during the year 1999-2001, 4-5 Mulberry crops are being grown in one acre of land. It is clear from these documents that, about 250 to 400 cocoons can be obtained in one crop in wet lands. 100 silk cocoons used to weigh about 45 to 50 kgs in wet lands and 30 to 35 kgs. in lands which are depending upon rains. Further, in the year 2001-2002, the average yield in a wet land would be 250 to 300 silk cocoons per crop. 100 silk cocoons used to weigh 50 to 55 kgs. The average price of silk cocoons per kg. would be Rs. 100/ to Rs. 150/-.

14. Looking to the evidence of PW.1 and the contents of Ex.P.2 to P.10, it is clear that, the claimant used to grow minimum 4 mulberry crops in the lands submerged under

Tonnur Tank. Further in the award Thakthe itself that, the LAO has admitted regarding the growing of Mulberry crop in the lands acquired by him. The documents i.e., Ex.P.9 & 10 are the letters issued by Assistant Director of Sericulture in favour of Assistant Executive Engineer, No. 24 Sub-Division, Pandavapura and in favour of Advocate for claimants. Both, these documents i.e., Ex.P.9 and P.10 contain the average yield of silk cocoons per crop and average price of silk cocoons per kg. As such, as per the contents of Ex.P.9 and P.10 a farmer would get a minimum of 250 to 400 silk cocoons per crop. Further, it is also clear that, a farmer would grow a minimum of 4 to 5 Mulberry crops in a year in wet lands. Hence, I deem it proper to take into consideration 4 Mulberry crops in a year so as to determine the market value in respect of wet lands in the case on hand on the basis of capitalization method. As such, if we take average yield of silk cocoons per crop on the basis of Ex.P.9 and P.10, it comes to about 325 silk cocoons per crop. Then, if we take the same into consideration, then the total yield per acre per year out of 4 Mulberry crops, it comes to about 1300 silk cocoons per year per acre. If 100 silk cocoons used to weigh 45 kgs., then 1300 silk cocoons would weigh about 585 kgs. per acre. So it is clear that an average of 585 kgs. of silk cocoons could be grown, out of 4 crops in a year. As such, if we take minimum price of the cocoons per kg. i.e. Rs. 100/- as per Ex.P.9 and P.10. Then, it comes to Rs. 58,500/- per acre per year. If we deduct 50% of the income, towards costs of cultivation as per the ruling reported in AIR 1997 S.C. page 1845, it comes to Rs. 29,250/- which shall be multiplied by 10 to arrive the market value of the lands in which the Mulberry crop was being grown. As such, if we multiply an amount of Rs. 29,250/- by 10, it comes to Rs. 2,92,500/- which is to be determined as the market value of the lands in question of claimant per acre. Hence, I determined the market value of the lands in question at Rs. 2,92,500/- per acre."

17. Not only affirming but while further enhancing the compensation, the High Court held as under :-

"6. As to the number of mulberry crops grown in the said land, the Reference Court has observed at Paragraph-14 of the impugned Judgment that as could be seen from Exs. P9 and P10, the claimant was growing maximum of 6 mulberry crop in a year. Despite making this observation, the Reference Court has taken only four crops a year, which is the minimum. Therefore, as rightly submitted by the learned counsel for the appellant, the Reference Court ought to have taken at least 5 crops in a year which is average of minimum and maximum of the number of crops. Further, it is not in dispute that the claimant was getting 325 silk cocoons from each of the crops. Further, though the evidence is to the effect that, 100 cocoons weigh 50 kilograms, the Reference Court took 45 kilograms as the weight of 100 cocoons. Therefore, the contention of the learned counsel for the appellant, that the learned Reference Court ought to have taken 50 kgs. as weight of 100 cocoons deserves our acceptance.

7. Further, though Ex.P.10 price list reveals that the price of 1 kilogram of cocoons was from Rs. 100 to 150/-, the Reference Court committed error in taking the minimum price Rs.100/-. In our view, it ought to have taken the average of minimum and maximum prices i.e. Rs.125/- per kilogram. If 5 mulberry crops per year and 325 cocoons per crop are taken and if weight of 100 cocoon is taken at Rs. 50 kilograms then per acre yield of cocoons in a year in terms of weight comes to 812.5 kilogram which may be rounded to 800 kilograms. Further, if the price per kilogram of cocoons is taken at Rs. 125/- the annual gross income per acre of land under acquisition comes to Rs. 1,00,000/- (one lakh). If 50% of this income is deducted towards the cost of sericulture, the net annual income from sericulture comes to Rs. 50,000/- per acre. By multiplying

this amount with the multiplier '10' we get the market value at the rate of Rs. 5 lakhs per acre, to which, in our opinion, the appellant-claimant is entitled and therefore, we hereby award the same in his favour."

18. In SLP (C) No. 21730 of 2008, the High Court gave a somewhat further elaborate reasoning in coming to the same conclusion of enhancing the rate to Rs. 5,00,000/- per acre.

"5. PW-1 has stated in his evidence that he used to grow maximum of 6 crops of mulberry plants in the land under acquisition for the purpose of feeding the silk worms. Further in Ex.P.9 (which is referred to; as Ex.P.8 in the evidence of PW.1) it is clearly mentioned at Sl. No.s. 81 and 82 that the claimant Karigodwda was growing mulberry crop in the land under acquisition to the entire extent of 37 guntas for the purpose of sericulture. This document is not disputed by the respondent-SLAO. Therefore, the contention of the learned AGA that the very fact that the claimant was doing sericulture in the land under acquisition by growing mulberry crop has not been established by adducing adequate evidence cannot be accepted.

6. As to the number of mulberry crops grown in the said land, the Reference Court has observed at Paragraph -14 of the impugned Judgment that as could be seen from Exs. P.9 and P.10, the claimant was growing maximum of 6 mulberry crop in a year. Despite making this observation, the Reference Court has taken only four crops a year, which is the minimum. Therefore, as rightly submitted by the learned counsel for the appellant, the Reference Court ought to have taken at least 5 crops in a year which is average of minimum and maximum of the number of crops. Further, it is not in dispute that the claimant was getting 325 silk cocoons from each of the crops. Further, though the evidence is to the effect that, 100 cocoons

weigh 50 kilograms, the Reference Court took 45 kilograms as the weight of 100 cocoons. Therefore, the contention of the learned counsel for the appellant, that the learned Reference Court ought to have taken 50 kilograms as weight of 100 cocoons deserves our acceptance.

7. Further, though Ex.P.10 price list reveals that the price of 1 kilogram of cocoons was from Rs. 100 to 150/- the Reference Court committed error in taking the minimum price Rs.100/-. In our view, it ought to have taken the average of minimum prices i.e. Rs. 125/- per kilogram. If 5 mulberry crops per year and 325 cocoons per crop are taken and if weight of 100 cocoon is taken at Rs. 50 kilograms then per acre yield of cocoons in a year in terms of weight comes to 812.5 kilogram which may be rounded to 800 kilograms. Further, if the price per kilogram of cocoons is taken at Rs. 125/- the annual gross income per acre of land under acquisition comes to Rs. 1,00,000/- (one lakh). If 50% of this income is deducted towards the cost of sericulture, the net annual income from sericulture comes to Rs.50,000/- per acre. By multiplying this amount with the multiplier '10' we get the market value at the rate of Rs. 5 lakhs per acre, to which, in our opinion, the appellant-claimant is entitled and therefore, we hereby award the same in his favour."

Scope of the statutory scheme for awarding the compensation under the provisions of the Act.

19. The challenge by the appellant-State is primarily based upon the permissible methodology which can be adopted by a court of law while granting fair market value of the land and the admissible quantum thereof. In order to examine the merit of the contentions raised before us, particularly in this regard, it would be necessary to examine the scheme of the Act.

20. It has been held that the provisions of the Act are self-contained and it is a Code in itself providing for a complete

procedure and steps which are required to be taken by the authorities concerned, for acquisition of land and payment of compensation. Part II and Part III of the Act deal with this aspect. Part II commences with a mandate that the appropriate authority shall issue a notification in terms of Section 4 of the Act, whereafter objections for acquisition are invited by the Collector and he shall conduct an inquiry in accordance with law. Having disposed off the objections after hearing the concerned parties, the Collector is expected to make an award. The possession of the acquired land has to be taken in accordance with the provision of the Act. Part III deals with the procedure of making a reference to the Court of specified jurisdiction and the procedure to be adopted thereupon. It also spells out what factors are to be taken into consideration by the Court and what should be ignored while determining the compensation. It is a compulsive acquisition and the lands are acquired without the voluntary action or consent of the land owners as they are left with no choice. The legislature in its wisdom has laid down the procedures and the guidelines which have to be adopted by the authorities concerned and subsequently by the Court of competent jurisdiction in regard to the acquisition of land and payment of compensation thereof. It is expected of the State to pay compensation expeditiously. Thus, it is obligatory on the part of the Court to follow the legislative intent in exercise of its judicial discretion. The legislative intent is of definite relevancy when the court is interpreting the law. Keeping in view the scheme of the Act, it will not be appropriate either to apply the rule of strict construction or too liberal construction to its provisions. The Act has a unique purpose to achieve, i.e. fulfillment of the various purposes (projects) to serve the public interest at large, for which the land has been acquired under the provisions of this Act by payment of compensation. The power of compulsive acquisition has an inbuilt element of duty and responsibility upon the State to pay the compensation which is just, fair and without delay. Thus, it will be appropriate to apply the rule of

plain interpretation to the provisions of this Act.

21. We may notice that Part III provides for procedure and rights of the claimants to receive compensation for acquisition of their land and also states various legal remedies which are available to them under the scheme of the Act. Under Section 18 of the Act, the Reference Court determines the quantum of compensation payable to the claimants. Section 23 provides guidelines, which would be taken into consideration by the court of competent jurisdiction while determining the compensation to be awarded for the acquired land. Section 24 of the Act is a negative provision and states what should not be considered by the court while determining the compensation. In other words, Sections 23 and 24 of the Act provide a complete scheme which can safely be termed as statutory guidelines and factors which are to be considered or not to be considered by the Court while determining the market value of the acquired land. These provisions provide a limitation within which the court has to exercise its judicial discretion while ensuring that the claimants get a fair market value of the acquired land with statutory and permissible benefits. Keeping in view the scheme of the Act and the interpretation which these provisions have received in the past, it is difficult even to comprehend that there is possibility of providing any straitjacket formula which can be treated as panacea to resolve all controversies uniformly, in relation to determination of the value of the acquired land. This essentially must depend upon the facts and circumstances of each case. It is settled principle of law that, the onus to prove entitlement to receive higher compensation is upon the claimants. In the case of *Basant Kumar and Ors. v. Union of India and Ors.* [(1996) 11 SCC 542], this Court held that the claimants are expected to lead cogent and proper evidence in support of their claim. Onus primarily is on the claimant, which they can discharge while placing and proving on record sale instances and/or such other evidences as they deem proper, keeping in mind the method of computation for awarding of compensation which they rely upon. In this very case, this Court

stated the principles of awarding compensation and placed the matter beyond ambiguity, while also capsulating the factors regulating the discretion of the Court while awarding the compensation. This principle was reiterated by this Court even in the case of *Gafar v. Moradabad Development Authority* [(2007) 7 SCC 614] and the Court held as under:

> "As held by this Court in various decisions, the burden is on the claimants to establish that the amounts awarded to them by the Land Acquisition Officer are inadequate and that they are entitled to more. That burden had to be discharged by the claimants and only if the initial burden in that behalf was discharged, the burden shifted to the State to justify the award."

Thus, the onus being primarily upon the claimants, they are expected to lead evidence to revert the same, if they so desire. In other words, it cannot be said that there is no onus whatsoever upon the State in such reference proceedings. The Court cannot lose sight of the facts and clear position of documents, that obligation to pay fair compensation is on the State in its absolute terms. Every case has to be examined on its own facts and the Courts are expected to scrutinize the evidence led by the parties in such proceedings.

22. At the cost of some repetition, we may notice that the provisions of Sections 23 and 24 of the Act have been enacted by the Legislature with certain objects in mind. The intention of the Legislature is an important factor in relation to interpretation of statutes. The statute law and the case law go side by side and quite often the relationship between them is supplementary. In other words, interpretation is guided by the spirit of the enactment. Interpretation can be literal or functional. Literal interpretation would not look beyond *litera legis*, while functional interpretation may make some deviation to the letter of the law. Unless, the law is logically defective and suffers from conceptual and inherent ambiguity, it should be given its literal meaning. Where the law suffers from ambiguity, it is said "interpretation

must depend upon the text and context. They are the basis of the interpretation. One may well say that if the text is the texture, context is what gives it colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the context. A statute is best interpreted when we know why it was enacted." [*Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors. :* (1987) 1 SCC 424].

23. The principle of construction of law is stated by Justice Holmes as under :-

> "You construe a particular clause or expression by construing the whole instrument and any dominant purposes that it may express. In fact, intention is a residuary clause intended to gather up whatever other aids there may be to interpretation besides the particular words and the dictionary."
>
> (Principles of Statutory Interpretation by Justice G.P. Singh, Page 15, 9th Edition 2004, Wadhwa & Co., Nagpur)

24. Where a statutory provision confers rights and also states mandatory or implied conditions which would have to be satisfied before the claim, can culminate into a relief, such considerations or conditions are relevant for the purposes of interpretation as well. A power conferred by the statute, often contains an express condition for its exercise and, in absence of, or in addition to the express condition, there are also implied conditions for exercise of power. Exercise of statutory power in breach of express or implied conditions will be illegal, if the conditions breached are mandatory. This principle, to a large extent, is applicable to exercise of rights arising from beneficial legislations, when an owner claims benefits under statutory provisions, it is for him to show that what is contemplated under the conditions attached thereto has been satisfied, particularly when such legislative intent is clear from the bare reading of

the provisions. Like the cases in hand, it is for the claimants to show that, to award the compensation payable under the statutory provisions, they have brought on record, evidence to satisfy the criterion and conditions required to be fulfilled for such a claim.

25. The provisions with which we are concerned primarily are the provisions of the statute which are coupled with obligations and limitations specified in them. The power is vested in the Collector to grant compensation; in courts to enhance the same in favour of the claimants whose lands are acquired, in case they are aggrieved. But, this power has to be exercised while keeping in mind the settled guidelines and parameters stated in Sections 23 and 24 of the Act. It will, thus, not be permissible for the authorities to go beyond the scope and purview of the provisions or the pre-requisites stated in these provisions for determination of the fair market value of the land. The statutory law as well as the judgments pronounced by the courts has consistently taken the view that compensation has to be determined strictly in accordance with the provisions of Sections 23 and 24 of the Act. The matters which are to be governed by the terms of Section 24 of the Act cannot be taken into consideration by extending discretion referable to the matters which should be considered by the courts in terms of Section 23 of the Act. To put it in another way, the court should apply the principle of literal or plain construction to these provisions, as the Legislature in its wisdom has not given to the court absolute discretion in matter relating to awarding of compensation but has intended to control the same by enacting these statutory provisions.

26. About the principle of plain meaning, it has been observed more than often, that it may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or

ambiguous unless they are studied in their context and construed. [Refer - *D. Saibaba v. Bar Council of India & Anr.:* AIR 2003 SC 2502].

27. The true import of the rule of plain meaning is well brought out in an American case Hutton v. Philips [45 Del 156], where Judge Pearson, after reaching his conclusion as to the meaning of the statutory language said :

> "That seems to me a plain clear meaning of the statutory language in its context. Of course, in so concluding I have necessarily construed or interpreted the language. It would obviously be impossible to decide that language is 'plain' (more accurately that a particular meaning seems plain) without first construing it. This involves far more than picking out dictionary definitions of words or expressions used. Consideration of the context and setting is indispensable properly to ascertain a meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it and desiring fairly and impartially to ascertain its significance would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning by comparison, strained, or far-fetched, or unusual or unlikely."

There are certain provisions which are capable of being given general description. Normally such provisions have two concepts - factual situation and the legal consequences ensuing therefrom. As already noticed, it is for the claimants to ascertain as a matter of fact - location, potential and quality of land for establishing its fair market value. After this fact is ascertained, its legal consequences i.e. awarding of compensation in terms of Sections 23 and 24 of the Act, the question before court of law is, whether the factual situation before it falls within the general description and principles in the statute. [Principles of Statutory Interpretation by Justice G.P. Singh, Page 51, 9th

Edition 2004].

28. In the light of these principles now we may advert to the language of Sections 23 and 24 of the Act. The provision open with the words, that in determining the amount of compensation to be awarded for land acquired under the Act, the court shall take into consideration the stated criteria and in terms of Section 23(1-A), the claimants would be entitled to additional amount @ 12 % per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, to the date on which the Award is made by the Collector or possession of the land is taken, whichever is earlier. In addition to this, in terms of Section 23(2), the land owners-claimants are entitled to 30% 'on such market value' because of the compulsory nature of acquisition. 'Such market value' is an expression which must be read *ejusdem generis* to the provisions of Section 23(1) of the Act, as they alone would provide meaning and relevancy to the guidelines which are to be taken into consideration by the courts for determining the market value of the land. The expression 'shall' can hardly be construed as 'may' giving an absolute discretion to the court to take or not to take into consideration the factors stated in Section 23(1) of the Act. The expression 'shall' thus would have to be construed as mandatory and not directory. It is more so, keeping in view the language of Section 24 of the Act, which mandates that the court shall not take into consideration the matters indicated in firstly to eighthly of Section 24 of the Act. This legislative intent needs to be noticed for beneficial and proper interpretation of these provisions in the light of the scheme underlining the provisions of the Act.

29. The expression 'such market value' used in Sections 23(1-A) and 23(2) respectively obviously would mean and refers to the market value determined in terms of Section 23(1) of the Act. This expression has been well explained by different judicial pronouncements and they have consistently been

following what the Privy Council in the case of *Municipal Council of Colombo v. Kuna Mana Navanna Suna Pana Letchiman Chettiar* [AIR (34) 1947 PC 118], laid down. There it is stated that "such market value" as used in Section 23 of the Act is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser. It is the price which would be payable to a person after the complete appraisal of land with its peculiar advantages and disadvantages being estimated with reference to commercial value.

30. This principle holds good even now and any other consequential right, legal or commercial, which remotely flows from an agricultural activity will not and should not be treated as a relevant consideration.

31. Equally true will be the principle that the extent of compensation would always depend on the facts and circumstances of the given case and it is not possible to set any absolute legal principle as a panacea which uniformly will be applicable or capable of being applied as a binding precedent *dehors* the facts of a given case.

32. The discretion of the Court, therefore, has to be regulated by the legislative intent spelt out under these provisions. It is no more *res integra* and has been well settled by different judgments of this Court, requiring that the computation of compensation has to be in terms of Sections 23 and 24 of the Act and that too from the date of issuance of the Notification under Section 4 of the Act. It is only the statutory benefits which would be available in terms of Sections 23(1-A) and 23(2) of the Act.

33. A Bench of this Court in the case of *Nelson Fernandes & Ors. v. Special Land Acquisition Officer, South Goa & Ors.* [(2007) 9 SCC 447], while discussing on this aspect of the Act and its relevancy to the market value of the land, held as under :-

"22. In determining the amount of compensation to be awarded, the LAO shall be guided by the provisions of Sections 23 and 24 of the Act. As per Section 22 of the Act, the market value of the land has to be determined at the date of publication of notice under Section 4 of the Act i.e. 25-8-1994. As per Section 24, the LAO shall also exclude any increase in the value of land likely to accrue from use to which it will be put once acquired. The market value of the land means the price of the land which a willing seller is reasonably expected to fetch in the open market from a willing purchaser. In other words, it is a price of the land in hypothetical market. During the site inspection, it has been observed that the land under acquisition is situated in Sancoale and Cortalim Village adjacent to the land already acquired for the same purpose earlier."

34. This was also reiterated by this Court in the case of *Mohammad Raofuddin v. The Land Acquisition Officer,* [(2009) 5 SCR 864] stating that Section 23 contains a list of positive factors and Section 24 has a list of negative, *vis-à-vis* the land under acquisition, to be taken into consideration while determining the amount of compensation, the first step being the determination of the market value of the land from the date of publication of Notification under sub-section (1) of Section 4 of the Act.

35. The next question which is of some importance arises out as a corollary to the above discussion. Should there be direct nexus between the potentiality of the acquired land as on the date of the Notification or can any matter which may be consequential or remotely connected with the agricultural activity be the basis for determining the market value of the land? Does the scheme of the Act, particularly with reference to Sections 23 and 24 of the Act permit such an approach? This question has to be answered in the negative. What is required to be assessed, is the land and its existing potentiality alone as on the date of acquisition. Moreover, the potentiality has to be

directly relatable to the capacity of the acquired land to produce agricultural products or, its market value relatable to the known methods of computation of compensation which we shall shortly proceed to discuss.

36. The second circumstance specified in Section 23(1) to be considered by the Court in determining compensation is the damage sustained by the person on account of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof. Even from a reasonable practicable view it has to be understood that the compensation which is payable to the claimants is in relation to the acquired land, the standing crops or trees and what they earn from the agricultural crops or fruits or trees on the agricultural land. To extend the benefit for the purposes of compensation, considering that the fruits grown on the agricultural land would be converted into Jam or any other eatable products will not be a relevant consideration within the scheme of the Act. The purpose is not to connect the acquisition to remote factors which may have some bearing or some connection with the agricultural activity being carried on, on the land in question. Such an approach by the Court is neither permissible nor prudent, as it would be opposed to the legislative intent contained under the provisions of Sections 23 and 24 of the Act.

37. Similarly, another example which can usefully be referred at this stage itself is that a person growing sugarcane on the land, which is acquired, would be entitled to the compensation of the land with reference to the agricultural yield and/or capitalization thereof only in respect of sugarcane. The rate of sugarcane in the market may be a relevant consideration but the fluctuating prices of sugar and other allied products in the market will be of no relevance in determining the fair market value of the acquired land.

38. It is the option of the agriculturist to give his sugarcane

crop for manufacture of sugar or gur or for any other purpose which he may choose using his business wisdom but the costing and manufacturing activity of that particular product for which the sugarcane had been supplied by him would not be, in our view, a relevant consideration for determining the fair market value of the land, whichever be the method of computation of compensation adopted by the court of competent jurisdiction.

39. Such approach is in consonance with the judicial pronouncements of this Court as well as the requirements of law. In the case of *State of Orissa v. Brij Lal Misra and Ors.* [(1995) 5 SCC 203], the Court clearly stated the principle that any increase in the amount awarded by way of compensation keeping in view the potentiality of the land and further increase on future potentiality would be contrary to the provisions of clauses *fifthly* and *sixthly* of Section 24 of the Act. The provisions of the Act require the court not to take into consideration various other factors including increase in the value of the acquired land, likely to accrue from the use for which it was acquired may be put to on a subsequent stage in regard to any lay out or improvement scheme etc.

40. Thus the restriction stated in law has been followed by the judgments of this Court and there is no occasion to take any view at variance to the existing law.

41. On proper analysis of the above stated principles and the relevant provisions of law, we have no hesitation in coming to the conclusion that consequential or remote benefits occurring from an agricultural activity is not a relevant consideration for determination of the fair market value on the date of the Notification issued under Section 4(1) of the Act. It is only the direct agricultural crop produced by the agriculturist from the acquired land or its price in market at best, which is a relevant consideration to be kept in mind by the court while applying any of the known and accepted method of computation of compensation or the fair market value of the acquired land.

42. Having answered the question of law, now we would proceed to apply this principle to the facts and circumstances of the cases before us. In paragraphs 16, 17 and 18 of this judgment we have referred to the findings recorded by the Reference Court and the High Court for enhancing the compensation from Rs. 90,640/- to Rs.2,92,500/- (by the Reference Court) and Rs.5,00,000/- (by the High Court) for wet (irrigated) land. The same is not in conformity with the settled principles of law.

43. Mulberry crop is a crop which is grown on the land and then this crop is used as feed for silk worms which ultimately results in producing silk thread used for various purposes at a commercial level.

44. The respondents in the present appeal had filed an affidavit dated 14th July, 2009 to substantiate their arguments that cocoons and silk thread is the end product for which the Mulberry crop is being used and, therefore, the income from or market value of cocoon and even the silk thread would be a relevant consideration for determination of compensation. In paragraph 1(1) of the affidavit it has been averred that cocoon (a female moth) in a single laying lays 450-550 Grains DFL (Deceased Free Layings) on a single day. The same is made to lie on an egg sheet. The entire 450-550 Grains are called as one egg and each of these Grains will develop as one cocoon. Therefore, out of one egg the claimants get 450-550 cocoons which weigh 1.5 gms to 2.00 gms. each. The literature annexed to this affidavit shows that Sericulture, the technique of silk production, is an agro-industry playing an eminent role in the rural industry of India. It also says that the cost of producing mulberry has a direct impact on the cost of producing cocoons, as nearly 60% of the total cost of production of cocoons goes to the production of mulberry leaves.

45. The photographs contained in the literature placed on record also show that mulberry crop is grown like other crops and its leaves are used as a feed to cocoons. It is after they

are provided with this food that they convert themselves into cocoons which are then industrially processed to the manufacture silk and is ultimately converted in those manufacturing units as a silk thread.

46. The handbook issued by the Central Silk Board under the title 'Handbook of Sericulture Technologies' shows that the full grown plant is a plant which is ready for pruning and suggest that to improve the leaf quality as well as the productivity, whenever necessary, plant protection measures must be followed. These measures are taken only after pruning and 15 to 18 days before leaf harvest for brushing. From brushing to two feedings after second instar, the silk worms are fed with tender leaves. The leaves to be harvested are from below the largest glossy leaf, which is yellowish green in colour. The cardinal point is shoot tip and it should not be removed during any crop. Below the glossy leaf, about 3 leaves during the first (1-3) and about 3 leaves (4-6) during the second instar can be harvested. Silk worms grow best when fed with fresh mulberry leaves, which are rich in nutrients and moisture. Under tropical conditions, driage of leaf is faster. Usually, the leaves are harvested twice a day and are preserved for successive feedings, depending on the necessity. During the periods, the leaves should be properly preserved.

47. Thus, the literature submitted by both the parties before us clearly show that manufacture of silk from cocoons is a process of manufacturing where the silk worms are fed with the mulberry leaves grown on fields and which alone is an agricultural activity. There is a connection between the two but it is not of such a direct relevancy that it should form the criteria for awarding compensation in terms of Section 23 of the Act. The mulberry crop is like tea crop and is grown in the shape of small trees or bushes. The leaves are taken off and used for feeding the silk worms for production of silk thread. It is upon the person carrying out the agricultural activity whether he sells his mulberry crop to a manufacturing unit or establishes his own

unit for that purpose and utilizes the mulberry crop grown on the fields for the process of manufacturing by providing it as a food to the silk worms.

48. It would have been more desirable for the reason that there was no evidence led by the claimants to substantiate and justify their claim with reference to the alleged silk cocoons being an agricultural activity, the onus being upon them. There was a presumption in the mind of the court as well as the claimants that, the manufacture of silk thread by the stated process of boiling silk cocoons which is the result of the silk worm being fed by mulberry leaves is an agricultural activity. This presumption is contrary to law and the literature referred by the expert body as well.

49. It is quite similar to the crops grown in different parts of the country for example sugarcane and tea. The tea leaves are pruned and used for manufacturing different kinds of tea and allied products. Similar is the case with the sugarcane. The manufacturing and commercial activities for manufacture of tea, sugar and for that matter silk from silk worms cannot be treated as a permissible factor to be taken into consideration by the courts for determining the fair market value of the land. Activity of agriculture cannot thus be equated to sericulture. While agricultural activity is the growing of mulberry crop and disbursing it, manufacture of silk thread from silk worms who are fed with mulberry leaves, and then converted through the specified process into cocoons and ultimately silk thread and its sale is an activity of sericulture which primarily falls in the domain of manufacturing and commercial activity. This activity of producing silk from silk worms for which mulberry crop is used as food, therefore, cannot be an activity directly covered under the provisions of Section 23 of the Act. Even by the process of judicial interpretation, it will amount to drawing an impermissible inference that sericulture is a part of agricultural activity, that too to the extent to make it a permissible consideration under the relevant provisions of the Act.

50. We may also usefully refer to a judgment of this Court in the case of *K. Lakshmanan and Co. and Ors. v. Commissioner of Income Tax,* [(1998) 9 SCC 537], where the Court was primarily concerned with what is the agricultural income for the purposes of the provisions of the Income Tax Act. The Court considered that the assessee was growing mulberry leaves which were not otherwise marketable and could only be used to feed the silk worms from which he was obtaining silk cocoons. It was held by the Court :

> "Had mulberry leaves been subjected to some process and sold in the market as such then certainly the income derived therefrom would be regarded as agricultural income but the case of the appellant before the authorities, and in this Court, has been that, mulberry leaves cannot be sold in the market and they can only be fed to the silkworms. The agricultural produce of the cultivator will be mulberry leaves and by no stretch of imagination can the silkworms, and certainly not the silk cocoons, be regarded as the agricultural produce of the cultivator."

51. The aforesaid judgment clearly shows and supports the view that we have taken, that silk worms being converted into silk cocoons and final product being silk thread for which some process or manufacturing activity is taken by the manufacturer, does not include growing of mulberry crop which is a food only for silk worms and thus, is only an agricultural activity and the entire remaining process cannot impliedly or by inference be termed as agricultural activity or an activity directly connected to agriculture for the purposes of Section 23 of the Act.

52. The learned Reference Court which enhanced the compensation to Rs.2,92,500/- in relation to wet land ; Rs.1,46,250/- lightly irrigated land and Rs.1,20,000/- to other land, and the High Court in enhancing compensation to Rs.5,00,000/- for wet land and Rs.2,53,750/- for dry land have primarily based their reasoning which is not sustainable in law being contrary to the statutory scheme of the Act.

53. We are unable to appreciate the approach adopted by the learned Reference Court and as upheld by the High Court. The basic error of law to which the courts below have fallen is that ultimate manufacturing of silk thread under the nomenclature of cocoons has been treated as a purely agricultural activity relevant for determination of fair market value of the land in terms of Section 23 of the Act.

54. We are unable to uphold the methodology adopted by the courts as well as the extent of compensation awarded to the claimants. The other reasons for our not accepting the findings recorded and compensation allowed by the High Court is that, there is no evidence on record to show that there is any intrinsic or inseparable link between the two activities. Furthermore, there is hardly any evidence on record, and in fact nothing was brought to our notice by the claimants have proved by documentary or any other cogent evidence, that they were carrying on the activity of sericulture and were utilizing mulberry crop only for that purpose. Even if that was so, we have serious doubt that even in those circumstances, whether it could be said to be a relevant consideration.

55. The error by the courts in appreciation of evidence is that they have treated the cocoons as the crop and not mulberry leaves. In fact, it is the very basis of a claim for higher compensation that cocoons being the agricultural end product, they were entitled to higher compensation. We have already indicated that there is no direct evidence led by the claimants in this regard. The courts have only referred to the statement of PW-1 to say that there were six crops of mulberry plants. Further, the document Exh. P-9 showed that claimant Karigowda (respondent herein) was growing mulberry crop on the entire acquired land of 37 guntas for the purpose of sericulture. Thus relying on Exhs. P-9 and P-10, statement of PW-1 and on the computation put forward by the claimants,

enhanced compensation was granted. It may be noticed that PW-1 in his own statement has stated that mulberry plants are used for the purposes of feeding the silk worms. He stated that farmers are doing sericulture in huge quantity in the area but which of the person was carrying on the said activity has not been stated. No record has been produced. Neither any other claimant entered in the witness box in support of the compensation claimed, nor any statistics or figures were produced, supported by the previous record, as to how they were carrying on this activity. The so called expert opinion again is not specific and supported by any scientific data. In fact, it is based more upon what the expert felt rather than the opinion which the expert would support, by actual physical inspection of the lands in question, data and literature.

56. It is also come on record that the entire lands situated in the village do not have the same fertility. Vide Exh. P-9 it was stated that the yield of cocoons per acre differ from crop to crop and this was an average estimated report. This exhibit is of no help to the claimants inasmuch it does not give the statistics with regard to mulberry crops but talks of cocoons which were stated to be 250-300 in one acre wet land (for 1 crop).

57. While adopting the criteria of capitalization and multiplying the same by 10, the finding of the High Court is clearly not supported by any cogent evidence on record and thus the question of applying the multiplier to a figure which has been arrived at, without any evidence would be inconsequential.

58. There is no direct and appropriate evidence to show any nexus to support the claim of the claimants. Thus, cocoons cannot be considered as a crop even as per literature submitted by the respective parties. Therefore the finding recorded is unsustainable even on appreciation of evidence.

What method should be adopted for determining fair market of the acquired land

59. To examine what method could be adopted for determining the market value of land and criticism of the method adopted by the Land Acquisition Collector, by the courts, that the same is not in accordance with law, we must notice various methods which are normally adopted by the Courts for determining the fair market value of the land and which of the method can be more properly applied in the facts and circumstances of this case.

60. Sections 23 and 24 of the Act spell out the have and have nots, applicable to the scheme of awarding compensation by the Collector but do not describe the methodology which should be adopted by the courts in determining the fair market value of the land at the relevant time. By development of law, the courts have adopted different methods for computing the compensation payable to the land owners depending upon the facts and circumstances of the case. The Courts have been exercising their discretion by adopting different methods, inter alia the following methods have a larger acceptance in law :

(a) *Sales Statistics Method:* In applying this method, it has been stated that, sales must be genuine and bonafide, should have been executed at the time proximate to the date of notification under Section 4 of the Act, the land covered by the sale must be in the vicinity of the acquired land and the land should be comparable to the acquired land. The land covered under the sale instance should have similar potential and occasion as that of the acquired land {*Faridabad Gas Power Project, N.T.P.C. Ltd. & Ors. v. Om Prakash & Ors.* [2009 (4) SCC 719], *Shaji Kuriakose & Anr. v. Indian Oil Corp. Ltd. & Ors.* [AIR 2001 SC 3341], *Ravinder Narain & Anr. v. Union of India* [2003 (4) SCC 481]}.

(b) Capitalization of Net Income Method: This method has also been applied by the courts. In this method of determination of market value, capitalization of net income

method or expert opinion method has been applied. {*Union of India & Anr. v. Smt. Shanti Devi & Ors.* [1983 (4) SCC 542], *Executive Director v. Sarat Chandra Bisoi & Anr.* [2000 (6) SCC 326], *Nelson Fernandes & Ors. V. Special Land Acquisition Officer, South Goa & Ors.* (supra)}

(c) *Agriculture Yield Basis Method:* Agricultural yield of the acquired land with reference to revenue records and keeping in mind the potential and nature of the land – wet (irrigated), dry and barren (banjar).

61. Normally, where the compensation is awarded on agricultural yield or capitalization method basis, the principle of multiplier is also applied for final determination. These are broadly the methods which are applied by the courts with further reduction on account of development charges. In some cases, depending upon the peculiar facts, this Court has accepted the principle of granting compound increase at the rate of 10% to 15% of the fair market value determined in accordance with law to avoid any unfair loss to the claimants suffering from compulsive acquisition. However, this consideration should squarely fall within the parameters of Section 23 while taking care that the negative mandate contained in Section 24 of the Act is not offended. How one or any of the principles afore stated is to be applied by the courts, would depend on the facts and circumstances of a given case.

62. In the present case, the Court has applied the method of agricultural yield and multiplier of 10 years. Further, it has declined to accept the method adopted by the Collector for granting compensation to the claimants for the reason that the SLAO ought not to have taken recourse to the method of sale statistics. It was further recorded that no sale instances of Sanaba Village three years prior to 2002 were available and instances of adjacent village should not have been taken into consideration. Instead, the market value should have been

calculated by adopting capitalization method and no reason was stated as to why this method was not applied. We are unable to accept the approach of the High Court as well as that of the Reference Court on both these issues. Firstly, we are of the considered view that adopting the method of agricultural yield and applying the multiplier method on the basis that the cocoon was an agricultural crop and resultantly silk cocoon itself was an agricultural activity was not correct. We need not elaborate on this aspect in view of our detailed discussion on it supra. Secondly, we are also of the firm view that the Reference Court fell in error of law in stating that the lands of the adjacent or nearby villages could not have been taken into consideration and compensation could be determined with reference to the sales statistics.

63. It is not in dispute before us that the entire land was acquired for the same purpose and, in fact, the entire land including the land of the adjacent villages had submerged or was utilized for the purposes of construction and operation of the Hemavathi Dam. This Court has held in number of judgments that the lands of the adjacent villages can be taken into consideration for determining the fair market value of the land, provided they are comparable instances and satisfy the other ingredients stated in this judgment. It can hardly be disputed that the land in the area of village Sanaba and the adjacent village is being used for growing mulberry crops which is supplied by the agriculturists to the silk factories or they use the same for their own benefit of manufacturing silk. The lands were given two classification i.e. wet land and lands which were not having their own regular source of irrigation (dry lands).

64. It is a settled principle of law that lands of adjacent villages can be made the basis for determining the fair market value of the acquired land. This principle of law is qualified by clear dictum of this Court itself that whenever direct evidence i.e. instances of the same villages are available, then it is most desirable that the court should consider that evidence. But

where such evidence is not available court can safely rely upon the sales statistics of adjoining lands provided the instances are comparable and the potentiality and location of the land is somewhat similar. The evidence tendered in relation to the land of the adjacent villages would be a relevant piece of evidence for such determination. Once it is shown that situation and potential of the land in two different villages are the same then they could be awarded similar compensation or such other compensation as would be just and fair.

65. The cases of acquisition are not unknown to our legal system where lands of a number of villages are acquired for the same public purpose or different schemes but on the commonality of purpose and unite development. The parties are expected to place documentary evidence on record that price of the land of adjoining village has an increasing trend and the court may adopt such a price as the same is not impermissible. Where there is commonality of purpose and common development, compensation based on statistical data of adjacent villages was held to be proper. Usefully, reference can be made to the judgments of this Court to the cases of *Kanwar Singh & Ors. v. Union of India* [JT 1998 (7) SC 397] and *Union of India v. Bal Ram & Anr.* [AIR 2004 SC 3981].

66. In this regard we may also make a reference to the judgment of this Court in the case of *Kanwar Singh & Ors. v. Union of India* [AIR 1999 SC 317], where sale instance of the adjacent villages were taken into consideration for the purpose of determining the fair market value of the land in question and their comparability, potential and acquisition for the same purpose was hardly in dispute. It was not only permissible but even more practical for the courts to take into consideration the sale statistics of the adjacent villages for determining the fair market value of the acquired land.

67. We are unable to hold, that the SLAO had exceeded its jurisdiction or failed to exercise its jurisdiction properly while making the sale statistics of the adjacent villages Sanaba and

Pandavapura as the basis for computing the compensation payable for the acquired land. However the extent of compensation which ought to have been awarded, we shall discuss shortly.

68. At this stage, we may notice the proceedings of the SLAO, where he submitted the draft compensation award of the acquired land to the Government for its approval in accordance with law. As per clause 6 of this Report, he had visited and inspected the lands in the presence of various officers at Village Sanaba, Chinakurali Hobli, Pandavapura Taluk, Karnataka which were flooded by the backwaters of the river. Even the claimants were present and they had prayed for compensation of Rs. 60,000/- per acre for dry land and Rs. 90,640/- per acre for garden land. But they did not produce any document before the said authority for determining the compensation for the acquired land. The Report reads as under :

"In this regard, as per confirmation letter of the guidance value at the office of the Sub-Registrar, Pandavapura, the guidance value of the dry land during the period 1998-99 to 2001-02 are as follows :

Years	Per Acre of dry land
1999-2000	Rs. 36,000-00
2000-2001	Rs. 36,000-00
2001-2002	Rs. 38,000-00
3 years	**Rs. 1,10,000-00**

Average 1,10,000 = 36,666.66 or 36,667-00

Per Gunta Rs. 916.68 or Rs. 917/-

While fixation of the compensation for the dry land, it is Rs. 37,200/- per acre of dry land and Rs. 930/- per gunta as per the statement of sale transaction at the office of the Sub Registrar, Pandavapura Taluk and as per the

guidance value it is observed to be Rs. 37,200/- per acre and Rs. 930/- per guntas of land.

While fixation of compensation amount to the garden lands, since there are no sale transactions of the garden lands in Sanaba Village, the statement of the same are not available for consideration at the office of the Sub-Registrar, Pandavapura. For the said reason, the statement of the sale transactions of the garden lands within the Hobli Circle of the said village is taken as base. As such, the details of the transactions are as under :

Sl No	Name of the Village	Sy. No.	Nature	Extent of land	Sale consid-eration	R.No. & date
01	Mahadevapura (Melukote Hobli)	84/1 land	Garden	0-10 G	Rs.26000	1318/99-00 4-10-99
02	Hosahalli (Chinkurali Hobli)	12/6	Garden land	0-18 G	Rs.37500	1770/99-00 6-12-99
03	Dinkakaval (Chinkurali Hobli)	Out of 33	Garden land	0-10 G	Rs.27000	184/00-01 29-04-00
04	Vaddara halli (Kasaba Hobli)	36/4 36/2 36/3	Garden land Garden land Garden land	0-09 0-03 0-02	Rs.30000	199/01-02 20-4-00
05	Vaddara halli (Kasaba Hobli)	51/7	Garden land	0-17½	Rs.37000	1028/01-02 26-06-01
	Total			**01-29 ½**	**1,57,500**	

The extent of garden land in which there was transaction : 01 Acre 29 ½ Guntas

Total amount of transaction : Rs. 1,57,500/-

Per Acre $\frac{1,57,500 \times 40}{69.5}$ = 90647-48 or 90640-00

Per gunta 2266-18 or 2266-00

Per Acre Rs. 90,640/- and per gunta Rs. 2266/-

In the same matter, the guidance value of the garden lands available at the office of the Sub-Registrar, Pandavapura is examined and the details are as under :

Year	Per Acre of garden land
1999-2000	Rs. 85,000-00
2000-2001	Rs. 85,000-00
2001-2002	Rs. 90,000-00
	Rs. 2,60,000-00

Per Acre = $\frac{2,60,000}{3}$ = Rs. 86,666.67 or Rs. 86,667 and

Per gunta Rs. 2167/-

While fixation of the compensation amount for the garden lands, finally, the statements of the sale transactions and the guidance value details were made in comparison. AS such, the statements of sale transactions as base is considered to be just and hence per acre of garden land Rs. 90,640/- and per gunta as Rs. 2,266/- is decided and fixed.

For the amount of compensation fixed i.e. Rs. 37,200/- per acre of dry land and Rs. 90,640/- per acre of garden land, as statement shall be prepared and for the said amount a legislative compensation at the rate of 30%

without interest shall be paid"

69. The above compensation was computed by the SLAO on the basis of the sale instances of the villages falling within the same Circle as well as on the basis of the guidance value maintained in the Register of the Sub-Registrar of the concerned villages. From the Report, it is evident that both these villages Sanaba and Pandavapura are located in the same Circle and are practically part of the larger revenue estate. It was not in dispute before us that primarily all these lands were being used for cultivating mulberry crop which is the sole agricultural activity. The court has to keep in mind a very pertinent equitable principle while awarding compensation, i.e the court should grant just and fair market value of the land at the time of the acquisition while ensuring that there is no undue enrichment. These are compulsive acquisitions but the guiding factor for the court is sale instances of a willing seller and a willing purchaser while determining the compensation payable. To award fair compensation is the obligation of the State and depending on the facts and circumstances of the case, the courts may enhance the compensation within the framework of law. The sale instances referred to by the Collector in his report are from the same villages or nearby villages or adjacent villages which are a part of the same Circle and where the land can easily said to be comparable as the entire chunk of the land was being used for raising mulberry crop and was acquired for common purpose, that is, the lands were submerged in the water coming from the Hemavathi Dam.

70. This Court in the case of Shaji Kuriakose (supra) held that out of the three afore stated methods, the courts adopt comparable sales method of valuation of land while fixing the market value of the acquired land, comparable sales method of valuation of land is preferred than the other methods such as capitalization of net income method or expert opinion method. Comparable sales methods of valuation is preferred because it furnishes the evidence for determination of the

market value of the acquired land which a willing purchaser would pay for the acquired land if it has been sold in open market at the time of issue of notification under Section 4 of the Act. In *Kantaben Manibhai Amin & Anr. v. The Special Land Acquisition Officer, Baroda* [AIR 1990 SC 103] this Court also stated that latest sale instance closer to the date of notification for acquisition of the land should be taken into consideration.

71. It is also an accepted judicial norm that the claimants can be given the benefit of awarding compensation on the basis of the genuine sale instance containing the highest rate, provided it has been proved in accordance with law and is a comparable instance. Such sale instance must satisfy all the requirements and pre-requisite stated in the Act. It should be a bonafide transaction and should also be in reasonable proximity to the date of notification under Section 4 of the Act. Since the SLAO had referred to the four sale instances which were produced before him and being part of the reference file, they were duly noticed by the Reference Court as well as by the High Court. But the Courts held that it was not appropriate to apply sales statistics method in the facts and circumstances of the case. Admittedly, the claimants produced no sale instances. In our view, these sale instances can be taken into consideration by the Court and benefit of the highest instance can be granted to the claimants in accordance with law in fixing the market value of the acquired land. Whatever benefit accrues to the claimants from the record produced and proved by the respondents, cannot be denied to them just because they have not produced evidence by way of sale instances.

72. The afore noticed sale instances which were taken into consideration by the SLAO, and which were part of the reference file show that there was an increasing trend in the sale price of the land in these villages as 10 guntas of garden land was sold in Mahadevpura (Melukote Hobli) for a sum of Rs. 26,000/- on 04.10.1999 while 9 guntas of garden land was

sold in Vadara Halli (Kasaba Hobli) for a sum of Rs. 30,000/- on 20.04.2000. Similarly, 18 guntas of garden land was sold in Hosahalli (Chinkurali Hobli) for a sum of Rs. 37,500/- on 06.12.1999 and 10 guntas of garden land was sold in Dinkakaval (Chinkurali Hobli) for a sum of Rs. 27,000/- on 29.04.2000, all these sold lands fall in the same circle. Besides this increasing trend and the fact that all these villages are adjacent villages to each other, the highest price fetched was for the sale instance executed on 26.06.2001 where 17 ½ guntas of garden land was sold in village Vaddara Halli (Kasaba Hobli) for a sum of Rs. 37,000/-. The notification under Section 4 was issued on 04.04.2002 that means that all the sale instances of the adjacent comparable lands are in proximity of time to the date of notification under Section 4 of the Act. The average of sale statistical instances referred above comes out to be Rs. 1,57,500/- for sale of 01 Acre 29 ½ Guntas i.e. 90,647.48 per acre. Since the sale instances relied upon are nearly around 1 to 2 ½ years prior to the date of notification, they are relevant considerations and, therefore, the claimants are entitled to an increase at the rate of 15% per annum compounded.

73. The aforesaid increase, in our view, is justified and equitable – firstly, on the ground that there was increasing trend in the sale price of that land and secondly, the lands acquired were being used by the agriculturists for production of mulberry crops which had a restrictive use in the manufacturing, commercial or industrial activities i.e. feeding the silk worms which are ultimately used for production of silk thread. The court cannot use this admitted restricted use to the disadvantage of the land owners and some benefit should be given to them while balancing the equities in accordance with law. The concept of fair compensation payable for the acquired land is embodied in the Act itself, particularly in view of *secondly* and *fifthly* of Section 23 of the Act. In fact, it was stated during the course of arguments by the learned counsel appearing for the appellants that, the State Government itself has given some

additional compensation to the claimants for mulberry crops which were standing at the time of submerging. We find this stand of the State Government to be reasonable and fair. Thus, giving a 15% compounded increase for 2 ½ years on the sale price of Rs. 1,08,000/- in respect of garden land, the claimants would be entitled to get compensation at the rate of Rs. 1,53,542.50 per acre for the wet (irrigated) land. This can even be examined from another point of view, that is, the sale instance no. 3 where the land in village Dinkakaval (Chinkurali Hobli) garden land of 10 guntas were sold for a sum of Rs. 27,000/- on 29.04.2000, i.e. approximately 2 years prior to the date of notification under Section 4 of the Act. This would give the sale price of the surrounding village lands to the acquired land at the rate of 1,08,000/- per acre for the garden land. Giving it a compound increase of 15% for two year it will come to Rs. 1,42,830/- (Rs. 1,08,000/- + 15% on Rs. 1,08,000/- = Rs. 1,24,200/- for the first year; Rs. 1,24,200/- + 15% on Rs. 1,24,200/- = Rs. 1,42,830/- for the second year) and Rs. 1,42,830/- + 7.5% of Rs. 1,42,830/- = Rs. 1,53,542.50 for two and half years.

We have two important facts which cannot be ignored by the Court. Firstly, that the claimants, by leading definite evidence have shown on record that the lands in question are not only lands having regular source of irrigation through the backwaters but otherwise are also lands superior to the other garden lands used for ordinary agricultural activities. The fields in question are being used exclusively for growing mulberry crops. Mulberry leaves are the only and the specified food for cocoons. In other words, the agricultural purpose for which the fields in question are being used is a special purpose and the crop so grown is again used for a specific commercial purpose to which there is no other alternative. In fact, none was stated before us by the learned counsel appearing for the parties. In all these peculiar facts, it cannot be disputed that some additional benefits have to be provided in favour of the claimants. In the present cases, the claimants have not only lost their agricultural

land but they have also been deprived of seasonal income that was available to them as a result of sale of mulberry leaves. Deprivation of livelihood is a serious consideration. The Court is entitled to apply some kind of reasonable guess work to balance the equities and fix just and fair market value in terms of the parameters specified under Section 23 of the Act. The SLAO has ignored both these aspects firstly providing of annual increase, and secondly, giving some weightage to the special agricultural purpose and the purpose for which the mulberry crop had to be utilized. The claimants have not proved and produced on record sale instances. They have also not produced on record any specific evidence to justify the compensation awarded to them by the Reference Court and/or the High Court. In fact, there is hardly any evidence, much less a cogent and impeccable evidence to support the increase on the basis of net income capitalization method. It is a settled rudiment of law that the Court, in given facts and circumstances of the case and keeping in mind the potentiality and utility of the land acquired, can award higher compensation to ensure that injustice is not done to the claimants and they are not deprived of their property without grant of fair compensation. Reference, in this regard, can be made to the judgment of this Court in the case of *Land Acquisition Officer, A.P. v. Kamadana Ramakrishna Rao* [(2007) 3 SCC 526]. While adopting the average sale method as the formula for awarding compensation to the claimants, we are also of the considered view that in the peculiar facts and circumstances of the case and the fact that the land is being compulsorily acquired, the claimants should be awarded a higher compensation. The compensation at the rate of Rs. 2,30,000/- per acre for the wet land and at the rate of Rs. 1,53,400/- per acre for the dry land would be just and fair compensation and would do complete justice between the parties. This element of increase had not been added by the SLAO which ought to have been done. As far as claimants are concerned, they have not produced and proved any sale instance and as already noticed, they have not

even brought on record any specific evidence to justify their claims relatable to and based upon net income capitalization method. In fact, we do not hesitate in observing that claimants have failed to discharge their onus fully and satisfactorily.

74. The claimants have proceeded on the assumption that they will be entitled to get compensation, by treating the silk cocoons reared by them as the yield from the land and by capitalizing the value of the silk cocoons. We have already held that the determination of the market value by capitalization of yield method will depend upon the agricultural yield, that is, value of agricultural produce less expenditure for growing them, and not with reference to a further sericultural activity by using the agricultural produce. Therefore, what could be capitalized for determination of market value was the value of mulberry leaves used for sericulture and not the value of silk cocoons produced by feeding such mulberry leaves to the silkworms. The yield of silk cocoons is the result of further human effort and industry, value of which obviously cannot be capitalized for the purpose of arriving at the market value of the agricultural land. The evidence discloses that the acquired lands were used for growing mulberry crop which was being harvested to provide feed for the silkworms by way of sericulture. Therefore, one way of arriving at the market value is to provide appropriate addition for the mulberry cultivation to the value arrived at for the land without mulberry cultivation. The second method is instead of taking the value of cocoons for the purpose of capitalization, take a part thereof, being the value of the mulberry crop input and capitalize the same. The land in question is special garden lands being used only for growing mulberry crop.

75. Keeping in mind the facts and circumstances of the case, it will also be just and fair to adopt some liberal approach with some element of guess work to provide the claimants with just and fair market value of the land in question. It must be remembered that, the entire land including village Sanaba and all other villages was acquired for the purpose of submerging

the lands because of the water coming from the Hemavathi Dam. In view of the cumulative discussion referred to above, we are of the considered view that it will be just, fair, equitable and in consonance with Sections 23 and 24 of the Act that the market value of the land as on 04.04.2002 can safely be taken as Rs. 2,30,000/- per acre in the case of garden land and, applying the accepted principle of reducing the said compensation in the case of dry lands by one third, the rate will be Rs.1,53,400/- per acre in the case of dry land keeping in view the peculiar facts and circumstances of the present case and the evidence on record.

Claim in regard to interest payable on taking of possession

76. The claimants while relying upon the judgment of this Court in *Satinder Singh & Ors. v. Umrao Singh and Anrs.* [AIR 1961 SC 908] and some other judgments of the High Court had claimed that they are entitled to receive interest from the date when their lands were submerged in the year 1993 onwards and not from the date of the Notification i.e. 4th April, 2002. It was contended that since they had lost possession and interest being payable in lieu of possession, they would be entitled to receive interest from those dates i.e. from 1993, and not from the date the Land Acquisition Collector had granted, i.e. 4th April, 2002. The Reference Court as well as the High Court accepted this contention while referring to the judgments of the *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. v. N.C. Budharaj (deceased) by Lrs. & Ors.,* [(2001) 2 SCC 721] and *Satinder Singh* (Supra), granted the relief to the claimants as prayed.

77. The reliance placed by the respondents upon the judgment of *N.C. Budharaj* (supra), was with reference to the scope and interpretation of the relevant provisions of the Act. That case related to the provisions of the Indian Arbitration Act, 1940 and with reference to the relevant sections of the Interest

Act, 1839, where this Court has held that provisions of the Act could be made applicable to arbitration as there was nothing to indicate that its application was restricted. Thus, it is not necessary for us to deliberate on the judgment of *N.C. Budharaj* case (supra) any further. Further, even the reliance placed upon *Satinder Singh* case (supra) is not of much help to the respondents. This judgment relates to the period, prior to introduction and/or amendment of Sections 23(1A), 23(2) and 34 of the Act i.e. on 30th April, 1982 and 24th September, 1984. It has been contended on behalf of the appellants, that it is now a well settled proposition of law that Reference Court cannot grant interest for any period prior to the issuance of the Notification under Section 4 of the Act. As such, possession even if taken or assumed to have been taken earlier would, dehor the provisions of the Act and, therefore, was improper. Thus, the possession has to be legal and within the framework of law. The provision of the Act clearly lays down the procedure required to be followed while taking possession of the acquired land. The words "from the date on which he took the possession of the land" occurring in Section 20 would mean lawful taking of possession. The case of *Shree Vijay Cotton & Oil Mills Ltd. v. State of Gujarat* [(1991) 1 SCC 262], also stated the principle that, interest on the compensation amount could be awarded under Section 34 of the Act, with effect from the date of taking possession. However, this controversy need not detain us any further, as the three Judge Bench of this Court in the case of *R.L. Jain (D) by Lrs. v. DDA & Ors.* [2004 (4) SCC 79] considered all these aspects of the matter and held as under :-

> **"…….**
>
> **15.** Similar view has been taken in a recent decision by a Bench of two Judges in *Lila Ghosh v. State of W.B.,* reported in (2004) 9 SCC 337 and the reasons given there in para 16 of the Report are being reproduced below:

16. ……There are two decisions of this Court, wherein same controversy arose, namely, whether the claimant would be entitled to additional sum at the rate of twelve per centum on the market value where possession has been taken over prior to publication of notification under Section 4(1). In *Special Tahsildar (LA), PWD Schemes v. M.A. Jabbar,* reported in (1995) 2 SCC 142 which has been decided by a Bench of two Judges (*K. Ramaswamy and Mrs Sujata V. Manohar,* JJ.), it was held that the claimant would not be entitled to this additional sum for the period anterior to publication of notification under Section 4(1). However, in *Asstt. Commr., Gadag Sub-Division v. Mathapathi Basavannewwa*, reported in (1995) 6 SCC 355 also decided by a two-Judge Bench (K. Ramaswamy and B.L. Hansaria, JJ.) it was held that even though notification under Section 4(1) was issued after taking possession of the acquired land the owners would be entitled to additional amount at twelve per cent per annum from the date of taking possession though notification under Section 4(1) was published later. For the reasons already indicated, we are of the opinion that the view taken in *Special Tahsildar* (supra) is legally correct and the view to the contrary taken in *Asstt. Commr.* (supra) is not in accordance with law and is hereby overruled.

17. Shri Dave, learned counsel for the appellant has also placed strong reliance on *Satinder Singh v. Umrao Singh* (supra) wherein the question of payment of interest in the matter of award of compensation was considered by this Court. In this case the initial notification was issued under Section 4(1) of the Land Acquisition Act, 1894 but the proceedings for acquisition were completed under East Punjab Act 48 of 1948. The High Court negatived the claim for interest on the ground that the 1948 Act made no provision for award of interest. After quoting with approval the following observations of the Privy Council in *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick*

Electric Power Commission, reported in AIR 1928 PC 287.

"upon the expropriation of land under statutory power, whether for the purpose of private gain or of good to the public at large, the owner is entitled to interest upon the principal sum awarded from the date when possession was taken, unless the statute clearly shows a contrary intention"

the Bench held as under:

"... when a claim for payment of interest is made by a person whose immovable property has been acquired compulsorily he is not making claim for damages properly or technically so-called; he is basing his claim on the general rule that if he is deprived of his land he should be put in possession of compensation immediately; if not, in lieu of possession taken by compulsory acquisition interest should be paid to him on the said amount of compensation".

17.1. The normal rule, therefore, is that if on account of acquisition of land a person is deprived of possession of his property he should be paid compensation immediately and if the same is not paid to him forthwith he would be entitled to interest thereon from the date of dispossession till the date of payment thereof. But here the land has been acquired only after the preliminary notification was issued on 9-9-1992 as earlier acquisition proceedings were declared to be null and void in the suit instituted by the landowner himself and consequently, he was not entitled to compensation or interest thereon for the anterior period.

18. In a case where the landowner is dispossessed prior to the issuance of preliminary notification under Section 4(1) of the Act the Government merely takes possession of the land but the title thereof continues to vest with the

landowner. It is fully open for the landowner to recover the possession of his land by taking appropriate legal proceedings. He is therefore only entitled to get rent or damages for use and occupation for the period the Government retains possession of the property. Where possession is taken prior to the issuance of the preliminary notification, in our opinion, it will be just and equitable that the Collector may also determine the rent or damages for use of the property to which the landowner is entitled while determining the compensation amount payable to the landowner for the acquisition of the property. The provisions of Section 48 of the Act lend support to such a course of action. For delayed payment of such amount appropriate interest at prevailing bank rate may be awarded."

78. We are bound by the decision of the larger Bench, which had considered the case of Satinder Singh (supra), on which the reliance has even been placed by the claimants in the present appeal. The larger Bench after detailed discussion on the subject, rejected the claim for payment of interest claimed by the respondents in those cases, prior to the date of issuance of the Notification under Section 4 of the Act. As is evident from the above dictum of the Court, despite dispossession, the title continues to vest in the land owners and it is open for the land owners to take action in accordance with law. Once notification under Section 4 (1) of the Act has been issued and the acquisition proceedings culminated into an award in terms of Section 11, then alone the land vests in the State free of any encumbrance or restriction in terms of provisions of Section 16 of the Act. The Court, in situations where possessions has been taken prior to issuance of notification under Section 4(1) of the Act, can direct the Collector to examine the extent of rent or damage that the owners of land would be entitled to. The provisions of Section 48 of the Act would come to aid and the Court would also be justified in issuing appropriate direction. This was the unequivocal view expressed by the Court in *R.L.*

Jain case (supra) as well. This legal question is no more open to controversy and stands settled by this Court. We would follow the view taken and accept the contention of the appellant-State that the Reference Court as well as the High Court could not have granted any interest under the provisions of the Act, for a date anterior to the issuance of Notification under Section 4 of the Act. However, following the dictum of the Bench, we direct the Collector to examine the question of payment of rent/ damages to the claimants, from the period when their respective lands were submerged under the back water of the river, till the date of issuance of the Notification under Section 4(1) of the Act, from which date, they would be entitled to the statutory benefits on the enhanced compensation.

79. As noticed in the opening part of the judgment, the respondents had taken an exception and raised objection to the maintainability of the appeal before this Court being directly filed against the judgment of the Principal Civil Judge, Senior Division (Reference Court). It is true, that right of appeal is a statutory right. It normally should be exercised in terms of the statute but the fact of the matter, in the present appeals, is that the High Court had followed its earlier view and disposed of number of appeals against the judgment of the Reference Court against which appeals have been preferred before this Court. In the meanwhile, the Reference Court had passed different judgments granting the same compensation against which appeal before the High Court would hardly be of any substantial benefit and would have been academic only. It also requires to be noticed at this stage that certain appeals preferred by the State against the judgment of the Reference Court, before the District Judge were also pending during the period when the High Court disposed of the above-noticed appeals. In other words, the fate of the appeals preferred by the State before the District Court (First Appellate Court) challenging the quantum of compensation awarded by the Reference Court stood decided in view of the judgment of the High Court and became academic. In these circumstances and keeping in view the

peculiar facts and circumstances of these cases, we do not propose to accept the objection raised by the respondents and while leaving the question of law open, dispose off the said appeal on merit.

The above-noticed facts clearly indicate that appeals are even now pending before various Courts in the State of Karnataka. The Government Authorities are expected to advert to the factors relating to the pendency of various appeals including those before the Reference Court and take steps at the earliest to remedy the legal grievances raised by the claimants at different levels of justice administration system. Despite its might, it is expected to be a responsible and reluctant litigant as there is obligation upon the State to act fairly and for the benefit of the public at large. It will be in harmony with the principle of proper administration that State also takes decisions which would avoid unnecessary litigation. An established maxim *"Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium",* casts a duty upon the Court to bring litigation to an end or at least endure that if possible, no further litigation arises from the cases pending before the Court in accordance with law. This doctrine would be applicable with greater emphasis where the judgment of the Court has attained finality before the highest Court. All other Courts should decide similar cases particularly covered cases, expeditiously and in consonance with the law of precedents. There should be speedy disposal of cases particularly where the small land owners have been deprived of their small land-holdings by compulsive acquisition. Any unnecessary delay in payment of the compensation to them would cause serious prejudice and even may have adverse effect on their living. In these circumstances, we consider it necessary to issue appropriate directions to the State authorities and request the Courts, where cases are pending arising from the same notification, to dispose of the pending proceedings without any further delay.

80. In view of the aforesaid discussion, we allow these appeals in part, with the following directions: -

(i) The appeals filed by the State are partially allowed. In the peculiar facts and circumstance of the present case, the claimants would be entitled to get compensation at the rate of Rs.2,30,000/- per acre for the wet/garden land and at the rate of Rs.1,53,400/- per acre for the dry land.

(ii) The claimants - land owners would be entitled to get statutory benefits on the enhanced compensation under Sections 23(1A) and 23(2) of the Act and interest in terms of Section 28 of the Act.

(iii) Since, the appeals filed by the State have been partially allowed by this Court, we hope that the Government shall grant compensation to all the interested persons whose lands have been acquired under the same notification and pay them compensation in terms of this judgment without any further delay.

(iv) Following the principle and the directions stated by this Court in *R.L. Jain's* case (supra), we grant liberty to the claimants to file applications before the competent authority (State Government/ concerned Collector) to claim damages for their dispossession from the lands owned by them as a result of submerging, till the date of issuance of notification under Section 4 of the Act i.e. 4th April, 2002. These applications may be filed within eight weeks from the date of pronouncement of this judgment. If such applications are filed we direct the competent authority to consider the same sympathetically and award such amounts to the claimants as may be payable in accordance with law expeditiously. We make it clear that the

amounts, if already paid for this period, shall be adjusted.

(v) The direction of the High Court for payment of interest for the period prior to the issuance of the notification under Section 4 of the Act i.e. 4th April, 2002 is hereby set aside and order to be deleted.

(vi) The appeals are allowed to the above extent.

(vii) Parties to bear their own costs.

K.K.T. Appeals partly allowed.

THE MANAGING DIRECTOR, HASSAN CO-OPERATIVE MILK PRODUCER'S SOCIETY UNION LIMITED.

v.

THE ASSISTANT REGIONAL DIRECTOR EMPLOYEES STATE INSURANCE CORPORATION

(Civil Appeal No. 3816 of 2010)

APRIL 26, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Employees' State Insurance Act, 1948 – ss. 45A and 2(9) – Employee – Payment of ESI contributions – Co-operative Milk Producer's Societies engaged in purchase of milk and pasteurization of the same – Workers employed by contractors in performance of contract awarded to them for transportation of milk – Liability of Milk societies to pay ESI contribution in respect of the workers – Held: Not liable – Workers employed by contractors in performance of contract awarded to them for transportation of milk, not covered by the definition of 'employee' u/s. 2(9) – No evidence to show that workers who did loading and unloading of milk cans were directly employed by Milk Societies – Also they are not employed on the premises of Milk Societies – Said workers did not work under the supervision of Milk Societies .

Words and phrases:

Expression 'supervision' – Meaning of – In the context of s. 2(9) of the Employees' State Insurance Act, 1948.

The appellants Co-operative Milk Producer's Societies, namely HCMPSU Ltd. and BURDCMPS Union, were engaged in purchase of milk and pasteurization of the same. The appellant awarded contract for transportation of milk for a specific period at a particular rate to the contractor. The contractor employed workers

for the same. The inspection of the appellant's establishment was carried out. The concerned authority passed an order u/s. 45A of the Employees' State Insurance Act, 1948 calling upon the appellants to pay contribution in respect of workers employed for transportation and procurement of milk together with interest. The appellant challenged the order before the Employees' State Insurance Court and the same was dismissed. The High Court upheld the order. Hence the appeals.

Allowing the appeals, the Court

HELD: 1.1 Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'; he must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in s. 2(9) of the Employees' State Insurance Act, 1948. [Para 17] [251-A-B]

Royal Talkies, Hyderabad and Others v. *Employees State Insurance Corporation* **(1978) 4 SCC 204, relied on.**

Regional Director, Employees' State Insurance Corpn., Madras v. *South India Flour Mills (P) Ltd.* **(1986) 3 SCC 238;** *Kirloskar Brother Ltd.* v. *Employees' State Insurance Corporation* **(1996) 2 SCC 682;** *Rajakamal Transport and Another* v. *Employees' State Insurance Corporation, Hyderabad* **(1996) 9 SCC 644;** *Transport Corporation of India* v. *Employees' State Insurance Corporation and Another* **(2000) 1 SCC 332;** *M/s. Saraswat Films* v. *Regional Director, E.S.I. Corporation Trichur* **JT 2002 (Suppl 1) SC 454, referred to.**

1.2. It is not the case of any of the parties nor there is any evidence to show that the persons who did loading

and unloading were directly employed by the appellants. Section 2(9)(i) is, therefore clearly not attracted as it covers the workers who are directly employed by the principal employer. Clause (ii) of s. 2(9) requires either (a) that the person to be an employee should be employed on the premises of the factory or establishment, or (b) that the work is done by the person employed under the supervision of the principal employer or his agent on work which is ordinarily part of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The expression "on the premises of the factory or establishment" comprehends presence of the persons on the premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence. [Para 18] [251-C-F]

1.3. For the purposes of loading and unloading the milk cans, the truck driver and loaders enter the premises of the appellants but mere entry for such purpose cannot be treated as an employment of those persons on the premises of the factory or establishment. The said expression does not comprehend every person who enters the factory for whatever purpose. This is not and can never be said to be the purpose of the expression. The persons employed by the contractor for loading and unloading of milk cans are not the persons employed on the premises of the appellants' establishment. [Para 18] [251-F-H; 252-A]

2.1. Although, E.S.I. Court in respect of the appellants in separate orders, recorded a finding that such workers work under the supervision of the principal employer and the said finding has not been interfered with by the High Court but it is difficult to accept the said finding. The ordinary meaning of the word 'supervision' is 'authority to direct' or 'supervise' i.e., to oversee. The expression

'supervision of the principal employer' u/s. 2(9) means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. Supervision for the purposes of s. 2(9) is 'consistency of vigil' by the principal employer so that if need be, remedial measures may be taken or suitable directions may be given for satisfactory completion of work. A direct disciplinary control by the principal employer over the workers engaged by the contractors may also be covered by the expression 'supervision of the principal employer'. The circumstances, as in the case of HCMPSU Ltd., that the authorized representatives of the principal employer are entitled to travel in the vehicle of the contractor free of charge or in the case of BURDCMPS Union, that the principal employer has right to ask for removal of such workers who misbehave with their staff are not the circumstances which may even remotely suggest the control or interference exercised by the appellants over the workers engaged by the contractor for transportation of milk. From the agreements entered into by the appellants with the contractors, it does not transpire that the appellants have arrogated to themselves any supervisory control over the workers employed by the contractors. The said workers were under the direct control of the contractor. Exercise of supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contracts of this nature and that by itself is not sufficient to make the principal employer liable. That the contractor is not an agent of the principal employer u/s. 2(9)(ii) admits of no ambiguity. [Para 22] [254-B-H; 255-A-B]

2.2. No evidence was collected by the E.S.I. Corporation during the inspection of the appellants' establishments or from the contractors that the appellants have any say over the terms and conditions

of employment of these employees or that the appellants have any thing to do with logistic operations of the contractors. As a matter of fact, there is nothing on record to show that principal employer had any knowledge about the number of persons engaged by the contractors or the names or the other details of such persons. There is also no evidence that the appellants were aware of the amount payable to each of these workers. In the circumstances, even if it be held that the transportation of milk is incidental to the purpose of factory or establishment, for want of any supervision of the appellants on the work of such employees, these employees are not covered by the definition of 'employee' u/s. 2(9) of the Act. [Para 22] [255-A-D]

C.E.S.C. Limited and Ors. v. Subhash Chandra Bose and Ors. **(1992) 1 SCC 441, relied on.**

Halsbury's Laws of England (Hailsham Edition) Vol. **I p 145, para 350, referred to.**

Case Law Reference:

(1986) 3 SCC 238	**Referred to.**	**Para 13**
(1996) 2 SCC 682	**Referred to.**	**Para 13**
(1996) 9 SCC 644	**Referred to.**	**Para 13**
(2000) 1 SCC 332	**Referred to.**	**Para 13**
JT 2002 (Suppl 1) SC 454	**Referred to.**	**Para 13**
(1978) 4 SCC 204	**Relied on.**	**Para 18**
(1992) 1 SCC 441	**Relied on.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3816 of 2010.

From the Judgment & Order dated 28.9.2005 of the High Court of Karnataka at Bangalore in MFA No. 2349 of 2004.

WITH

C.A. No.3817 of 2010.

A.S. Bhasme and Nikhil Nayyar for the Appellant.

V.J. Francis and Sanjeev Anand for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. These two appeals, by special leave, are concerned with the liability of the appellants to pay ESI contribution in respect of the workers employed by the contractors in performance of the contract awarded to them for transportation of milk.

3. The two appeals arise out of different proceedings. Brief narration of facts in relation to each of the appellants may be set out first.

Hassan Cooperative Milk Producer's Society Union Limited (for short, 'HCMPSU Ltd.').

4. HCMPSU Ltd. is a federal society. Its main business is purchasing milk and pasteurization of the same. The milk procured by member societies is transported in lorries/vans to the appellant's dairy. For that purpose, contract is awarded on the basis of rate per kilometer to the lowest bidder. The contractor collects the milk from the various societies in cans on specified routes and transports to the appellant's dairy. The empty cans are retransported and returned to the respective member societies. On September 23, 1994, a show cause notice was issued by the Assistant Regional Director, Employees' State Insurance Corporation, Bangalore to the HCMPSU Ltd. calling upon them to furnish explanation and show cause as to why action should not be taken against them for non-payment of contribution under the Employees' State Insurance Act, 1948 (for short, '1948 Act') in respect of the

employees of the appellant. It is not in dispute that this notice related to the employees engaged by the contractors for the transportation of milk. The appellant responded to the show cause notice by filing their reply on October 10, 1994, inter-alia, stating therein (a) that the main business of the appellant is to process milk, receive and sell the same to the public in the concerned districts through their agents. The appellant does not appoint the officers and subordinates to collect the milk from the societies located in different places and (b) that appellant calls for tenders and awards the contract for transportation of milk for specified period at a particular rate per kilometer. The contractors engage workers for that work but such workers are neither directly nor indirectly employees of the appellant and; the appellants have no control over such employees nor they supervise their work. The wages or salary of such workers have also not been paid by the appellant. Another notice was also issued by the concerned authority to which reply was submitted by the appellant stating therein that the workers so engaged by the contractors do not work in the premises of the appellant's establishment and for this reason also 1948 Act is not applicable. It appears that inspection of the appellant's establishment was conducted by the concerned authority under the 1948 Act and thereafter an order under Section 45A of 1948 Act came to be passed on March 21/24, 1995 calling upon the appellant to pay contributions totaling Rs. 65,834/- for the period April 1, 1989 to March 31, 1990 in respect of the workers employed for transportation and procurement of milk together with interest payable at the rate of 12 per cent per annum upto August 31, 1994 and 15 per cent from September 1, 1994 till the date of actual payment, within a period of 15 days from the date of receipt of the order. The appellant challenged the aforesaid order under Section 75 read with Sections 76 and 77 of 1948 Act before the Employees' State Insurance Court at Mysore (ESI Court). The ESI Court did not find any merit in the application and dismissed the same vide order dated January 29, 2004 holding that the work of

employees engaged by the contractors is incidental to the main work carried out by the appellant and that supervision over the work of such employees by the appellant is also established. The appellant challenged the aforesaid order before High Court of Karnataka by filing statutory appeal under Section 82(2) of 1948 Act which has been dismissed by the impugned order.

The Bangalore Urban and Rural District Co-operative Milk Producers Societies Union Limited (for short, 'BURDCMPS Union')

5. BURDCMPS Union is a cooperative society. By virtue of a tripartite agreement, Bangalore Dairy became its unit w.e.f. September 1, 1988. Bangalore Dairy was earlier a constituent of Karnataka Dairy Development Corporation and subsequently became a constituent of Karnataka Milk Federation. For the purpose of transportation, distribution and procurement of milk and milk products, Bangalore Dairy used to entrust the work to independent contractors after inviting tenders. The said contractors were being paid charges on kilometer basis. The appellant adopted the same system. An inspection was conducted by ESI Inspector in respect of transportation of milk and milk products through transport contractors for the period from October 1985 to December 1991 and from January 1992 to March 1993. On October 13, 1993, a notice indicating tentative determination of dues was issued to the appellant to show cause as to why contribution under 1948 Act should not be recovered from them. In response to the show cause notice, the appellant appeared through its representative and contested the liability. It appears that the authority asked the appellant to bifurcate the wage element involved in the amount paid to the contractors and produce the same for verification which was not done. The Assistant Regional Director, Bangalore by his order dated September 6, 1994 finally determined an amount of Rs. 4,81,313/- for the period from October 1985 to March 1993 and held that the said amount was liable to be paid by the appellant within 15 days

from the date of receipt of the order. In the said order, interest at the rate of 12 per cent per annum was also ordered to be paid. The appellant challenged the aforesaid order before ESI Court, Bangalore under Section 75 of 1948 Act. ESI Court dismissed the application vide order dated October 30, 1999. The appellant then filed an appeal under Section 82 of 1948 Act before the Karnataka High Court which too was dismissed on August 24, 2007.

6. 1948 Act was enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury and for certain incidental matters. That the Act is beneficial legislation admits of no doubt. It is appropriate at this stage to refer to definition of terms, 'contribution', 'employee', 'immediate employer', 'principal employer' and 'wages' occurring in 1948 Act.

7. 'Contribution' is defined in Section 2 (4) which means the sum of money payable to the Employees State Insurance Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of 1948 Act.

8. 'Employee' is defined in Section 2(9) as follows :

"S. 2(9).- "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment', whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or

establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include —

(a) any member of [the Indian] naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government] a month:"

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;"

9. Section 2(13) defines 'immediate employer' while

Section 2(17) defines 'principal employer'. The definitions of 'immediate employer' and 'principal employer' in the 1948 Act are as follows :

"S. 2(13).- "immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor"

"S. 2 (17) "principal employer" means—

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;"

10. Section 2 (22) defines 'wages' thus :

"S. 2 (22).- "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorized leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include –-

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any traveling allowance or the value of any traveling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

11. Sections 46 to 73 in Chapter-V provide for claims and benefits such as sickness benefit, maternity benefit, disablement benefit, medical benefit, etc.

12. The answer to the controversy presented before us has to be found primarily from Section 2(9) which defines 'employee' and the terms of agreements. Section 2(9) has been extensively analysed by this Court in *Royal Talkies, Hyderabad and Others* v. *Employees State Insurance Corporation*[1] thus :

"**14.** Now here is a break-up of Section 2(9). The clause contains two substantive parts. Unless the person employed qualifies under both he is not an 'employee'. Firstly, he must be employed "in or in connection with" the work of an establishment. The expression "*in connection with the work of an establishment"* ropes in a wide variety

1. (1978) 4 SCC 204.

of workmen who may not be employed in the establishment but may be engaged only in *connection with* the work of the establishment. Some nexus must exist between the establishment and the work of the employee but it may be a loose connection. 'In connection with the work of an establishment' only postulates some connection between what the employee does and the work of the establishment. He may not do anything directly for the establishment; he may not do anything statutorily obligatory in the establishment; he may not even do anything which is primary or *necessary* for the survival or smooth running of the establishment or integral to the adventure. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment. Surely, an amenity or facility for the customers who frequent the establishment has connection with the work of the establishment. The question is not whether without that amenity or facility the establishment cannot be carried on but whether such amenity or facility, even peripheral may be, has not a link with the establishment. Illustrations may not be exhaustive but may be informative. Taking the present case, an establishment like a cinema theatre is not bound to run a canteen or keep a cycle stand (in Andhra Pradesh) but no one will deny that a canteen service, a toilet service, a car park or cycle stand, a booth for sale of catchy film literature on actors, song hits and the like, surely have connection with the cinema theatre and even further the venture. On the other hand, a bookstall where scientific works or tools are sold or a stall where religious propaganda is done, may not have anything to do with the cinema establishment and may, therefore, be excluded on the score that the employees do not do any work *in connection with* the establishment, that is, the theatre. In the case of a five-star hotel, for instance, a barber shop or an arcade, massage parlour, foreign exchange counter or tourist assistance

counter may be run by some one other than the owner of the establishment but the employees so engaged do work *in connection with* the establishment or the hotel even though there is no obligation for a hotel to maintain such an ancillary attraction. By contrast, not a lawyer's chamber or architect's consultancy. Nor, indeed, is it a legal ingredient that such adjunct should be *exclusively* for the establishment if it is mainly its ancillary.

15. The primary test in the substantive clause being thus wide, the employees of the canteen and the cycle stand may be correctly described as employed *in connection with* the work of the establishment. A narrower construction may be possible but a larger ambit is clearly imported by a purpose-oriented interpretation. The whole goal of the statute is to make the principal employer primarily liable for the insurance of kindred kinds of employees on the premises, whether they are there *in the work* or are merely *in connection with* the work of the establishment.

16. Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'. He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9).

17. Section 2(9)(*i*) covers only employees who are *directly* employed by the principal employer. Even here, there are expressions which take in a wider group of employees than traditionally so regarded, but it is imperative that any employee who is not *directly* employed by the principal employer cannot be eligible under Section 2(9)(*i*). In the present case, the employees concerned are admittedly not directly employed by the cinema proprietors.

18. Therefore, we move down to Section 2(9)(*ii*). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the 'principal employer' has no direct employment relationship since the 'immediate employer' of the employee concerned is some one else. Even so, such an employee, if he works (*a*) on the premises of the establishment, or (*b*) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies under Section 2(9)(*ii*). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the premises or be under the supervision of the principal employer or his agent. Assuming that the last part of Section 2(9)(*ii*) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (*a*) such as is *ordinarily* (not necessarily nor statutorily) part of the work of the establishment, or (*b*) which is merely preliminary to the work carried on in the establishment, or (*c*) is just *incidental* to the purpose of the establishment. No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goers ordinarily find such work an advantage, a facility, an amenity and some times a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two

operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre."

13. The masterly analysis and clear exposition of the term 'employee' as defined in Section 2(9) done by V.R. Krishna Iyer, J. in *Royal Talkies*[1] has been consistently followed in subsequent decisions. Some of these decisions are : (1) *Regional Director, Employees' State Insurance Corpn., Madras* v. *South India Flour Mills (P) Ltd.*[2] ; (2) *Kirloskar Brother Ltd.* v. *Employees' State Insurance Corporation*[3]*;* (3) *RaJakamal Transport and Another* v. *Employees' State Insurance Corporation, Hyderabad*[4]*;* (4) *Transport Corporation of India* v. *Employees' State Insurance Corporation and Another*[5] and (5) M/s. *Saraswat Films* v. *Regional Director, E.S.I. Corporation,. Trichur.*[6]

14. In the light of the definition of the 'employee' under Section 2(9) as interpreted by this Court in *Royal Talkies1* and subsequent decisions, we may examine the question as to whether the workers employed by the contractors in performance of the contract awarded to them by the appellants for transportation of milk are covered by Section 2(9). The reference to relevant clauses of the agreement at this stage will be appropriate.

15. The relevant clauses of the agreements between HCMPS Union and contractors are :

"(1) That in consideration of the H C M P S U Ltd., paying to the contractor at the rate of Rs. 2.50 (Rupees two and fifty paise only) per Kilometer of

2. (1986) 3 SCC 238.
3. (1996) 2 SCC 682.
4. (1996) 9 SCC 644.
5. (2000) 1 SCC 332.
6. JT 2002 (Suppl 1) SC 454.

journey, the contractor hereby agrees to transport the Milk from the places on routes specified in schedule-1 annexed to this agreement, which all shall form part of this agreement.

(2) It is further agreed that the rate of specified above shall include the cost of loading the milk at the points specified as above into the vehicles, transporting the same on the routes specified to the specified Dairy/Chilling Centres and unloading the same at the specified Dairies/Chilling centre. The contractor also bring back the empty cans, bottles, etc. to the place from where he had taken them out.

(7) The contractor shall ply the vehicles owned by him and shall provide/produce the vehicles with the registration certificate tax paid receipts, comprehensive insurance certificate and all the specified for the purpose of satisfying the ownership of the vehicles and road worthiness of the vehicles and farther undertakes to replace the such vehicles which in the option of the authorities of the HCMP SUL are not fit for the purpose of transporting the milk as agreed to.

(9) The contractor shall make his own arrangements for the engaging the workers required for loading and unloading and transport operations and further agrees to abide by the provisions of the contract labour (Regulation and Abolition) Act, in the matter of payment of their wages etc. and further indemnify the HCMP SUL against any claim by such workers.

(14) The contractor shall strictly confirm to the various instructions to be given from time to time by the authorities of the HCMPSU Ltd., with regard to the safe transportation of the can milk/sachet Milk and other materials as agreed to under this contract.

(17) The contractors further agreed that the addition to his workmen he shall allow the staff authorized representatives of HCMPSU Ltd, including the officials of the Milk Producing Co-operatives societies to travel free of charges in the contractors vehicle.

(26) (i) If any employee/representative of the contractor is found pilfering and/or adulterating and/or destroying the milk and other items entrusted to the contractor during the transportation or during/ loading/unloading operations to the premises of the milk producers Union/societies the contractor shall responsible for the loss and the contractor shall make good all such losses incurred by DCs from the day of default upto 15 days H C M P S U Ltd., may at its discretion forfeit the security, deposit and terminate the contract.

(ii) If any employee of representative of the Contractor misbehaves and or indulges in disorderly conduct with the staff of the milk producers union/societies, or with the members of the General public the H C M P S U Ltd., may require the contractor to remove such undesirable persons from the transport work. The contractor shall not reemployed such undesirable persons who have been removed from the transport work either by the contractor himself or by any other contractor engaged by H C M P S U Ltd., "

16. As regards the agreements between BURDCMPS Union and contractors, the relevant clauses are :

"(1) In consideration of payment of transport charges by the Dairy the Contractor at the rate of Rs.6-40 (Rupees six and paise forty only) per K.M. of journey, the contractor shall carry in his motor

vehicles and deliver at the appointed sale points the Dairy products entrusted to him for such purpose, once in the morning and one in the evening or as required by the Dairy daily. The Contractor, who files tenders for more than two routes should have one standing vehicle for replacement in the event of any breakdown of his vehicle during the transport of Dairy products. After delivery of the Dairy products at all the sale point, the Contractor shall deliver all the teens, crates containers and returned dairy products to the Dairy immediately upon arrival at the Dairy.

(5) No person other than the persons employed by the Dairy or the contractor for the purpose of Transport, shall be carried in any vehicle of the contractor while it is engaged in the performance of this contract.

(6) The contractor shall promptly remove any employee of his who behaves improperly with the Dairy staff or the selling agents or their men at the sale points, on a complaint by the Dairy.

(7) If any pilferage or shortage or adulteration is found to have occurred in the course of transport, the full value of the Dairy property pilfered, short found or adulterated shall be recoverable by the Dairy from the contractor. If any pilferage or shortage or adulteration is found to have occurred in the course of transport for second time, the contractor will also incur the liability for cancellation of the contract in addition to his liability to pay full value of the Dairy property pilfered, short-found or adulterated."

17. We shall assume, to test the validity of the contention, in favour of the E.S.I. Corporation that workers engaged by the contractor (immediate employer) for transportation of milk have been employed in connection with the work of the principal

employer and these employees, thus, qualify under first substantive part of Section 2(9). But as stated in *Royal Talkies*1 that merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'; he must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9). Are these workers covered by any of these categories?

18. It is not the case of any of the parties nor there is any evidence to show that the persons who did loading and unloading were directly employed by the appellants. Section 2(9)(i) is, therefore clearly not attracted as it covers the workers who are directly employed by the principal employer. As a matter of fact, the thrust of the arguments centred round clause (ii) of Section 2(9). This clause, requires either (a) that the person to be an employee should be employed on the premises of the factory or establishment, or (b) that the work is done by the person employed under the supervision of the principal employer or his agent on work which is ordinarily part of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The expression "on the premises of the factory or establishment" comprehends presence of the persons on the premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence. We shall again assume in favour of the E.S.I. Corporation that for the purposes of loading and unloading the milk cans, the truck driver and loaders enter the premises of the appellants but mere entry for such purpose cannot be treated as an employment of those persons on the premises of the factory or establishment. We are afraid, the said expression does not comprehend every person who enters the factory for whatever purpose. This is not and can never be said to be the purpose of the expression. It has to be held that the persons employed by the contractor for loading and unloading

of milk cans are not the persons employed on the premises of the appellants' establishment.

19. Now, the next question is, can these workers, in the facts and circumstances of the case, be said to be working under the supervision of the appellants. It is appropriate to refer to a decision of this Court in *C.E.S.C. Limited and Others v. Subhash Chandra Bose and Others*[7]. In that case, the question that fell for consideration was, whether on the facts found, the right of the principal employer to reject or accept work on completion, on scrutinizing compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful "supervision" as envisaged under Section 2(9) of the 1948 Act. The majority view explained :

> **"14.** ……In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help to carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial 'a stich in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can

7. (1992) 1 SCC 441.

delegate to his agent who in the eye of law is his second self, i.e., a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a contractee cannot be the same person…….".

20. The decision also referred to the definition of "agent" drawn in Halsbury's Laws of England (Hailsham Edition) Vol. I at page 145, para 350 which is as follows :

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control and supervision of the principal."

21. After taking into consideration Section 182 of the Indian Contract Act, 1872 that defines 'agent', the majority view recorded its conclusion thus :

"20. Thus on both counts, the principal question as well as the subsidiary question must be answered against the ESIC holding that the employees of the electrical contractors, on the facts and circumstances, established before the Division Bench of the High Court, do not come in the grip of the Act and thus all demands made towards

ESI contribution made against the CESC and the electrical contractors were invalid. We affirm the view of the High Court in that regard."

22. Although, E.S.I. Court in respect of the appellants in separate orders, has recorded a finding that such workers work under the supervision of the principal employer and the said finding has not been interfered with by the High Court but we find it difficult to accept the said finding. The ordinary meaning of the word 'supervision' is 'authority to direct' or 'supervise' i.e., to oversee. The expression 'supervision of the principal employer' under Section 2(9) means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. As held in C.E.S.C. Ltd.7 that supervision for the purposes of Section 2(9) is 'consistency of vigil' by the principal employer so that if need be, remedial measures may be taken or suitable directions given for satisfactory completion of work. A direct disciplinary control by the principal employer over the workers engaged by the contractors may also be covered by the expression 'supervision of the principal employer'. The circumstances, as in the case of HCMPSU Ltd., that the authorized representatives of the principal employer are entitled to travel in the vehicle of the contractor free of charge or in the case of BURDCMPS Union, that the principal employer has right to ask for removal of such workers who misbehave with their staff are not the circumstances which may even remotely suggest the control or interference exercised by the appellants over the workers engaged by the contractor for transportation of milk. From the agreements entered into by the appellants with the contractors, it does not transpire that the appellants have arrogated to themselves any supervisory control over the workers employed by the contractors. The said workers were under the direct control of the contractor. Exercise of supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contracts of this nature and that by itself is not sufficient to make the principal

employer liable. That the contractor is not an agent of the principal employer under Section 2(9)(ii) admits of no ambiguity. This aspect has been succinctly explained in C.E.S.C. Ltd.7 with which we respectfully agree. No evidence has been collected by the E.S.I. Corporation during the inspection of the appellants' establishments or from the contractors that the appellants have any say over the terms and conditions of employment of these employees or that the appellants have any thing to do with logistic operations of the contractors. As a matter of fact, there is nothing on record to show that principal employer had any knowledge about the number of persons engaged by the contractors or the names or the other details of such persons. There is also no evidence that the appellants were aware of the amount payable to each of these workers. In the circumstances, even if it be held that the transportation of milk is incidental to the purpose of factory or establishment, for want of any supervision of the appellants on the work of such employees, in our opinion, these employees are not covered by the definition of 'employee' under Section 2(9) of the Act.

23. As a result of the foregoing discussion, both appeals are allowed and the impugned orders are set aside. No order as to costs.

N.J. Appeals allowed.

PUNJAB ROADWAYS MOGA THROUGH ITS GENERAL MANAGER

v.

PUNJA SAHIB BUS AND TRANSPORT CO. AND ORS.

(Civil Appeal No. 3879 of 2010)

APRIL 27, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Motor Vehicles Act, 1988: ss.98, 99, 100, 102, 104 and proviso to s.104 – Scheme published on 9th August 1990 as amended – Stage carriage permit – Scheme providing for a ratio with regard to grant of permits on notified routes between the STUs and private operators – Power to cancel/modify the scheme or change the ratio fixed – Held: Such power rests with the State Government and is not conferred on the RTA – No private operator has right to claim regular permit to operate his service on any part of notified area/route upsetting the ratio prescribed in the scheme except on a temporary permit granted under the proviso to s.104 of the Act – Chapter V and VI – Constitution of India, 1950 – Road transport.

Constitution of India, 1950: Article 226 – Scope of – High Court in exercise of power under Article 226 granting regular permits to private operators upsetting the ratio fixed in the scheme framed under Motor Vehicles Act, 1988 – Justification of – Held: Not justified – Grant of stage carriage permit is primarily a statutory function to be discharged by RTA exercising power under s.72 of 1988 Act and not by High Court exercising constitutional powers under Articles 226, 227 – Motor Vehicles Act, 1988.

In terms of the Scheme published on 9th August, 1990 modified by the Punjab Government on 21.10.1997, the routes on the National as well as the State Highways were shared by the STUs and the private operators in a

specified ratio. The question which arose for consideration in the appeals was whether High Court in exercise of power under Article 226 of Constitution of India was justified in directing the Commissioner exercising the powers of RTAs, to grant regular permits to the private operators on the ground that the STUs had either failed to utilize the permits granted or surrendered the permits or had not applied for the permits in the notified routes.

Disposing of the appeals, the Court

HELD: 1.1. There was complete misreading of the provisions of Scheme published on 9th August, 1990 as amended and provisions of Chapter VI of the Motor Vehicles Act, 1988. Provisions of this Chapter confer a monopoly on the State in respect of transport service to the partial or complete exclusion of other persons. The scheme once published is law and chapter VI has an overriding effect on Chapter V of the Act and it operates against everyone unless it is modified or cancelled by the State Government. The scheme provides for a ratio with regard to the grant of permits on the notified routes between STUs and private operators which is fixed based on the assessment made by the State Transport Commissioner, Punjab on the basis of the passenger road transport needs which is legally binding on all. The provisions of the scheme including the list of routes mentioned in the various annexures, and the ratio fixed are statutory in character which cannot be tinkered with by the RTAs and have overriding effect over the powers of RTAs under Chapter V of the Act. The power to cancel the Scheme or modify the Scheme rests with the State Government under Section 102 of the Act. The RTA and the Tribunal committed a grave error in tampering with the Scheme as well as disturbing the ratio fixed by the Scheme by granting regular permits to the private sector

from the quota earmarked for STUs. Once a scheme is approved and published, private operators have no right to claim regular permits to operate their vehicles in the notified area, route or portion thereof upsetting the ratio fixed. [Paras 21, 22] [269-F; 270-C-G]

1.2. A combined reading of Sections 99, 100 and 104 in the light of Section 2(38) of the Act, makes it clear that once a scheme is published under Section 100 in relation to any area or route or portion thereof, whether in complete or partial exclusion of other persons, no persons other than STUs may operate on the notified area or route except as provided in the scheme itself. Section 104 of the Act states that where a scheme has been published under Sub-section 3 of Section 100 in respect of any notified area or notified route, STA or the RTA as the case may be, shall not grant any permit except in accordance with the provisions of the Scheme. An exception has been carved out in the proviso to Section 104 stating, where no application for permit has been made by the STU in respect of any notified area or notified route in pursuance of an approved scheme, the STA or the RTA, as the case may be, may grant temporary permits to any person in respect of any such notified area or notified route subject to the condition that such permit shall cease to be effective on the issue of permit to the STU in respect of that area or route. Same is the situation in respect of a case where an STU inspite of grant of permit does not operate the service or surrenders the permit granted or not utilizing the permit. In such a situation it should be deemed that no application for permit has been made by the STU and it is open to the RTA to grant temporary permit if there is a temporary need. By granting regular permits to the private operators, RTA will be upsetting the ratio fixed under the scheme which is legally impermissible. [Paras 23, 25] [271-B; 272-A-E]

Adarsh Travels Bus Service and Anr. v. State of U.P. and Ors. **(1985) 4 SCC 557,** *U.P. State Road Transport Corporation, Lucknow v. Anwar Ahmad and Ors.* **(1997) 3 SCC 191;** *Ram Krishna Verma v. State of U.P.* **(1992) 2 SCC 620, referred to.**

1.3. If the public is put to hardship or inconvenience due to failure on the part of the STUs to operate services inspite of grant of permits for a considerable long time, it is always open to the State Government to modify the scheme and make appropriate changes in the ratio fixed on the basis of passenger road transport needs as assessed by the State Transport Commissioner but such a power is not conferred on the RTA and till that is done, no private operator can operate his service on any part or portion of a notified area or notified route upsetting the ratio prescribed in the scheme except on a temporary permit granted under the proviso to Section 104 of the Act. [Para 26] [273-C-E]

UPSRTC and Another v. Sanjidha Banu and Ors. **(2005) 10 SCC 280;** *M. Madan Mohan Rao & Ors. v. UOI & Ors.* **(2002) 6 SCC 348;** *U.P. SRTC v. Omaditya Verma* **(2005) 4 SCC 424, relied on.**

2. Article 226 of the Constitution of India confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of fundamental rights or any other purpose, the powers are of course wide and expansive but not to be exercised as an appellate Authority re-appreciating the finding of facts recorded by a Tribunal or an authority exercising quasi judicial functions. Power is highly discretionary and supervisory in nature. Grant of stage carriage permits is primarily a statutory function to be discharged by the RTA exercising powers under Section 72 of the Act and not by the High Court exercising the Constitutional powers under Article

226 or 227 of the Constitution of India. A writ Court seldom interferes with the orders passed by such authorities exercising quasi-judicial functions, unless there is serious procedural illegality or irregularity or they have acted in excess of their jurisdiction. If there is any dispute on the proper implementation of the ratio or inclusion or exclusion of any route or area in the Scheme, the RTA can always examine the same, if it is moved. The direction given by the High Court to the RTA to grant regular permits to the private operators, is therefore, patently illegal. [Para 27] [273-F-H; 274-A-C]

Case Law Reference:

(1985) 4 SCC 557	**referred to**	**Para 23**
(1997) 3 SCC 191	**referred to**	**Para 23**
(1992) 2 SCC 620	**referred to**	**Para 23**
(2005) 10 SCC 280	**relied on**	**Para 26**
(2002) 6 SCC 348	**relied on**	**Para 26**
(2005) 4 SCC 424	**relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3879 of 2010.

From the Judgment & Order dated 1.12.2006 at High Court of Punjab and Haryana at Chandigarh in C.W.P. No. 11768 of 2005.

WITH

C.A. Nos. 3880, 3881, 3882, 3883, 3884, 3885-3886 of 2010.

Ajay Pal, Kuldip Singh, R.K. Pandey, T.P. Mishra, Sanjay Kayal, H.S. Sandhu for the Appellant.

Jawahar Lal Gupta, Rani Chhabra, Mohan Pandey, Rajesh

Sharma, Yogesh Dahiya and Shalu Sharma for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted in all these special leave petitions.

Facts of the first two appeals.

2. We will first deal with the first two appeals which arise out of a common order dated 21.8.2000 passed by the State Transport Commissioner (in short "the Commissioner") exercising the powers conferred on the Regional Transport Authorities of Jalandhar, Patiala and Ferozpur. The order of the Commissioner was confirmed by the State Transport Appellate Tribunal (in short "the Tribunal") *vide* its order dated 27.4.2005, but interfered with by the High Court in C.W.P No.8483/2005 and C.W.P. No.11768 of 2005 respectively with a positive direction to the Commissioner to grant Stage Carriage Permits to the private operators rejecting the claims of the State Transport Undertakings (STUs). The legality of the order of the High Court is under challenge in these two cases filed by the State of Punjab through the Commissioner and the Punjab Roadways, Moga, represented by its General Manager.

3. The Secretary, Regional Transport Authority, Jalandhar, published a notice in the Motor Transport Gazette, Weekly, Chandigarh in its issue dated 22.2.1999 inviting applications for the grant of four Stage Carriage Permits for plying two return trips daily in the Pathankot – Faridkot via Mukkerian, Dasuya, Jalandhar Nakodar, Moga, Talwandi Bhai, Mudki route a substantial portion of which falls within the National and State Highways. As per the scheme published on 9th August, 1990 (in short the '1990 Scheme') modified by the Punjab Government on 21.10.1997 (in short the '1997 modified scheme'), the routes on the National as well as State Highways have to be shared by the STUs and private operators in a specified ratio.

4. In response to the notice, 112 applications were received which included the applications from the General Manager, Punjab Roadways, Moga as well as from the Pepsu Road Transport Corporation, Faridkot, (STUs).

5. The contents of the applications were published in the Motor Transport Gazette Weekly, Chandigarh in its issue dated 22.4.1999 inviting representations/suggestions from the general public, but there was no response.

6. Out of the 112 applicants, 31 applicants failed to respond. Out of four permits, it was decided by the Commissioner that two permits with one return trip daily be allotted to STUs and other two trips to the private operators. The General Manager, Punjab Roadways, Moga applied for the grant of two stage carriage permits with one return trip daily in the notified route and the General Manager, Pepsu Road Transport Corporation, Faridkot applied for the grant of four stage carriage permits for plying two return trips daily on that route.

7. The representatives of the STUs submitted that due share of mileage be allotted to them. The Commissioner heard the rest of the applicants who had applied for permits in the private sector. It was decided that the applications of existing operators be not considered in the interest of healthy competition and for maintaining balanced transport service and also to ensure that monopoly of individuals or a group be not allowed to develop in the particular route/ area.

8. Applications from the new entrants were considered by the Commissioner and it was resolved vide order dated 21.8.2000 to grant one stage carriage permit for plying one return daily trip each on the notified route to the Punjab Roadways, Moga and to Pepsu Road Transport Corporation, and one permit to Gurbhajan Singh and Jagdev Singh jointly

and the other to Metro Transport Registered Sangrur for a period of five years. The grantees were allowed three months' time to obtain the permits.

9. Aggrieved by the order of the Commissioner, three appeals — Appeal Nos.391/2000, 233/2001 and 147/2004 were preferred by the private applicants before the Tribunal under Section 89 of the Motor Vehicles Act, 1988 (in short the 'Act') challenging the grant of permits to the private operators and the STUs. Before the Tribunal, it was represented that STUs though granted the permits, were not operating the services and, therefore, those permits be granted to the appellants so that public would not be put to inconvenience. On their request, reports were called for from the Regional Transport Authority (in short the 'RTA') to ascertain as to whether the STUs were in fact operating services. The Secretary, RTA, Jalandhar *vide* his reports dated 5.4.2005 and 20.4.2005 reported that the permit granted to Pepsu Transport Corporation was surrendered by it on 1.6.2002 and that the Punjab Roadways had so far not utilized the permit. The Tribunal considered the comparative merits of the applicants and found no illegality in the order granting the permits to the private operators and found no reason to disturb the grant of permits to STUs. Appeal No.223/2007 was also rejected on the ground of delay so also on the ground that applicant cannot be treated as a new entrant since its sister concern was already granted permit. All the three appeals were therefore rejected by the Tribunal *vide* its order dated 27.4.2005.

10. Aggrieved by the said order, Majhi Express Transport Service Corporation, preferred Writ Petition C.W.P. No.8483/2005 and Punja Sahib Bus Transport Corporation preferred Writ Petition C.W.P. No.11768 of 2005 before the Punjab and Haryana High Court. The Writ Petition C.W.P. No.8483/2005 came up before a Division Bench of the Punjab and Haryana High Court on 24.10.2005. It was represented before the Court that since STUs had failed to operate the two permits granted

to them, those permits be granted to the Writ Petitioner. The High Court took the view that the Tribunal was not justified in declining grant of permit to the Writ Petitioner on the ground of delay and on the ground that its sister concern had already been granted a permit on 9.11.2004. Further, the High Court also took the view that due to non user of the permit by the STUs, public will be the sufferer. The Court noticed that the permit granted to STUs was neither utilized nor operated and, hence, it was not open to the STUs to raise any objection regarding the grant of permit to the writ petitioner. The High Court, therefore, gave a positive direction to the Commissioner to grant one stage carriage permit with half return trip daily to the said writ petitioner. The permits granted to the other private operators were not interfered with.

11. C.W.P. No.11768/2005 later came up for hearing before the Division Bench on 1.12.2006 and following the judgment in Writ Petition no. 8483/2005, the Court ordered that one stage carriage permit be granted to the writ petitioner therein also with half return trip daily in the notified route since the STUs were not operating the permits granted. Permits granted to the private operators were not interfered with.

12. Aggrieved by the judgments in C.W.P. No.8483/2005 and 11768/2005, the State of Punjab and the Punjab Roadways Moga respectively have filed the first two appeals.

Facts in the other appeals.

13. We shall now refer to the facts of the other connected appeals since some of the issues which arise for consideration in all those appeals are common. The Punjab Roadways has preferred all these appeals challenging the common judgment dated 1.5.2007 of the Punjab and Haryana High Court in C.W.P. No.11916/2006, CWP No.123/2006, 11332/2006, 12982/2006, 9085/2005 and 5824/2006. The Punjab Roadways was the petitioner in all those writ petitions challenging the orders passed by the Tribunal on 28.10.2005,

17.12.2004, 25.8.2005, 3.10.2005 and 1.8.2005 directing grant of permits to private operators in various notified routes on the ground that Punjab Roadways was not operating services inspite of grant of permits. In these appeals, the Punjab Roadways has contended that the Tribunal as well as the High Court has erred in granting regular permits to the private sector over-looking the claims of STUs in gross violation of 1990 scheme as modified in the year 1997 and the provisions of Chapter VI of the Act.

14. The learned counsel for the appellants submitted that the High Court was not justified in directing the Commissioner to grant permits to the private operators on the ground that the STUs had either not utilized the permits, surrendered the permits or not applied for the permits. Learned counsel submitted that substantial portions of the notified route fall under the National/State Highways and as per the provisions of the 1990 scheme as amended in the year 1997 the mileage of different types of routes in the State of Punjab has to be shared by the STUs along with private operators in the prescribed ratio mentioned in the scheme. Learned counsel submitted that the STUs could not operate services due to insufficiency of fleets and dearth of staff and now STUs are in possession of sufficient number of buses and are in a position to operate services on the notified routes. Learned counsel submitted that granting permits falling in the share of STUs to the private operators would be against the provisions of the Act and the Rules and the provisions of notified scheme. Learned counsel submitted that even if STUs had failed to utilize the permits or surrendered the permits, or had failed to apply for permits on the notified routes those vacancies could be filled up only by inviting fresh applications and only temporary permits could be granted in case if there is a public need. Learned counsel submitted that the Tribunal and the High Court have committed a grave error in directing the RTA to grant regular permits to the private operators on the notified routes upsetting the ratio fixed by the scheme in gross violation of the proviso to Section 104 of the Act.

15. Mr. Jawahar Lal Gupta, learned senior counsel appearing for the contesting respondents submitted that there is no illegality in the order passed by the High Court in directing the grant of stage carriage permits to the private operators since there was failure on the part of STUs in operating the services in spite of grant of permits. Learned senior counsel referred to Rule 128(5) of the Punjab Motor Vehicles Rules, 1989 and submitted that if the grantees fail to utilise the permit for a period of more than six months, the permit would lapse and the grantee is debarred from raising further claims on the grant of permit to the other operators. Learned senior counsel also submitted that the High Court was justified in directing the grant of permits to the private operators under Article 226 of the Constitution of India in public interest. Learned senior counsel also referred to the 1990 scheme and submitted the route i.e. Pathankot – Faridkot does not find a place in the annexures to scheme and is not a notified route. Further, it was also pointed out that the Pathankot – Faridkot is not a monopoly route of the STUs and no portion of the route partly overlaps any of the monopoly routes. It was also pointed out that with reference to the appeal by Punjab Roadways, Nawanshahar, that the route in dispute that is Ludhiana to Mahilpur is also not a monopoly route and is not a part of the list annexed with the 1990 scheme. Various other infirmities have also been pointed out.

16. The first question for our consideration is whether the Tribunal and the High Court are justified in directing the Commissioner exercising the powers of RTAs to grant regular permits to the private operators on the ground that the STUs had either failed to utilize the permits granted or surrendered the permits or had not applied for the permits in the notified routes. In order to examine that question it is necessary to refer to the 1990 Scheme as amended in the year 1997.

17. The Government of Punjab, in exercise of the powers conferred under Section 100 of the Act, formulated a scheme

so as to provide an efficient, adequate, economical and properly co-coordinated road transport service in the State of Punjab. Notification to that effect was published in Punjab Government Gazette (Extra Ordinary) dated 9th August, 1990 stipulating areas and routes to be operated by the STUs to the complete or partial exclusion of other persons. Clause 5, 6 and 7 of the Scheme are relevant for our purpose and hence extracted hereunder :-

> (5) All future operations of routes on the National Highways falling within the State shall be undertaken by the State Transport Undertakings and the private operators in the ratio of 30:30 which shall be determined on the basis of the passenger road transport needs, as so assessed by the State Transport Commissioner, Punjab, from time to time. The existing operations of the State Transport Undertakings on the National Highways falling within the State are given in Annexures 'D' and D-1.
>
> (6) all future operations of routes on the State Highways other than the routes specified in clauses 2, 3 and 4 shall be undertaken by the State Transport Undertakings and private operators in the ratio of 50:50 which shall be determined on the basis of the passenger road transport needs, as so assessed by the State Transport Commissioner, Punjab, from time to time. The existing operation of routes of the State Transport Undertakings on the State Highways are given in Annexure 'E' and 'E-1'.
>
> (7) All future operations of routes other than the routes specified in clauses 2,3 and 4 on District and other roads shall be undertaken by the State Transport Undertakings and private operators in the ratio of 50:50 on the basis of the passenger road transport roads, as to assessed by the State Transport Commissioner, Punjab, from the time to time." [Page 8 of the Written Notes].

18. Annexure 'A' of the Scheme deals with monopoly routes operated by the STUs viz., Punjab Roadways and Pepsu Road Transport Corporation. Annexure 'B' of the Scheme deals with the list of National Highways. Annexure 'C' of the Scheme deals with a list of State Highways Roads. Annexure 'D' deals with the list of routes falling on National Highways (Punjab Roadways). Annexure 'D-1' deals with list of routes falling on National Highways (Pepsu Road Transport Corporation). Annexure 'E' deals with list of routes falling on State Highways (Punjab Roadways) and Annexure 'E-1' deals with list of routes falling on State Highways (Pepsu Road Transport Corporation). Future operations of services on the above mentioned routes have to be undertaken by the STUs and private operators in the prescribed ratio mentioned in the Scheme.

19. The 1990 Scheme was modified by the Government of Punjab in exercise of the powers conferred under Section 102 of the Act and a notification to that effect was published in the Punjab Government Gazette (Extraordinary) dated 21.10.1997. Clause 5 of the 1990 Scheme was amended and the ratio 30:30 was substituted by 75:25 and the ratio 50:50 mentioned in Clauses 6 and 7 was substituted by 50:50 are 40:60 respectively as per the amended scheme dated 21.10.1997. The Tribunal in its orders dated 27.04.2005 as well as on 28.10.2005 has stated that the routes for which applications were preferred by the STUs for the grant of permits were notified routes under the Scheme. All the parties had proceeded as if the routes in question were included in the 1990 Scheme. Before the Tribunal it was represented by the private operators that though the Pepsu Transport Corporation was granted a Stage Carriage Permit on the route notified, the same was surrendered by the Corporation on 1.6.2002 and the Punjab Roadways though was granted permit had failed to utilize the permit. Few other instances were also pointed out where inspite of grant of permits the STUs had either surrendered the permits or were not operating the permits on the routes notified. A copy of such an order dated 19.7.2007

passed by the Secretary RTA, Jullandhar was produced before this Court and it was submitted that Punjab Roadways, Pathankot had surrendered 29 return trips on the route between Amritsar and Pathankot. Further it was also contended that due to surrendering of large number of return trips on the route, the public of that area was put to considerable hardships and inconvenience. Consequently it was pointed out that there is no illegality in granting regular permits to the private operators in the vacancies occurred either due to surrender of permits or not utilizing the permits or on omission to apply for permits in the notified routes.

20. The Tribunal in Appeal No. 46 of 2000 and connected matters, decided on 28.10.2005 has taken a view that where an STU applies for permit and if it is granted and, thereafter the STUs fail to operate the services inspite of grant, they will lose their right and share of the permits unless the route in question is Inter-state or monopoly routes. Further, it was also held if the permit is not utilized within the maximum period of six months under Sub-rule 5 of Rule 128 of the Punjab Motor Vehicles Rules, 1989 the RTA could revoke the sanction of the permit. Further it was also held in such a case RTA has a right to issue regular permits and not temporary permits as provided in the proviso to Section 104 of the Act.

21. We find it difficult to accept the reasoning of the Tribunal. In our view, there is complete misreading of the provisions of 1990 Scheme as amended and provisions of Chapter VI of the Act. Provisions of this Chapter confer a monopoly on the State in respect of transport service to the partial or complete exclusion of other persons. Section 98 says that provisions of above mentioned Chapter and the Rules or orders made thereunder shall have effect notwithstanding, anything inconsistent contained in Chapter V or in any other law for the time being in force or any instrument having effect by virtue of any such law. Section 99 of the Act deals with preparation and publication of proposal regarding road

transport services of an STU which enables the State Government to formulate a proposal for the purpose of providing an efficient, adequate, economical and properly co-coordinated road transport service, by giving particulars of the nature of the service proposed to be rendered, the area or route proposed to be covered and other relevant particulars respecting thereof and the Government is also empowered to publish such a proposal in the gazette in public interest. After calling for objections to the proposed scheme, and examining the same the scheme has to be published in accordance with the provisions of Section 100 of the Act. The scheme once published is law and chapter VI has an overriding effect on Chapter V of the Act and it operates against everyone unless it is modified or cancelled by the State Government.

22. The scheme also provides for a ratio with regard to the grant of permits on the notified routes between STUs and private operators which is fixed based on the assessment made by the State Transport Commissioner, Punjab on the basis of the passenger road transport needs which is legally binding on all. The provisions of the scheme including the list of routes mentioned in the various annexures, and the ratio fixed are statutory in character which cannot be tinkered with by the RTAs and have overriding effect over the powers of RTAs under Chapter V of the Act. The power to cancel the Scheme or modify the Scheme rests with the State Government under Section 102 of the Act and the RTA and the Tribunal have committed a grave error in tampering with the Scheme as well as disturbing the ratio fixed by the Scheme by granting regular permits to the private sector from the quota earmarked for STUs. Once a scheme is approved and published, private operators have no right to claim regular permits to operate their vehicles in the notified area, route or portion thereof upsetting the ratio fixed. Since the scheme makes provision for partial exclusion, the private operators are not completely excluded, they may get regular permits on the notified route or portion thereof in accordance with the terms and conditions laid down

in the scheme and within the quota earmarked for them.

23. Therefore, a combined reading of Sections 99, 100 and 104 in the light of Section 2(38) of the Act, makes it clear that once a scheme is published under Section 100 in relation to any area or route or portion thereof, whether in complete or partial exclusion of other persons, no persons other than STUs may operate on the notified area or route except as provided in the scheme itself. Reference can be made to the decisions of this Court in *Adarsh Travels Bus Service and Anr*. vs. *State of U.P. and Ors.*, (1985) 4 SCC 557, *U.P. State Road Transport Corporation, Lucknow vs. Anwar Ahmad and Ors.* (1997) 3 SCC 191, *Ram Krishna Verma* vs *State of U.P.* (1992) 2 SCC 620.

24. Section 104 of the Act specifically restricts the grant of permits in respect of notified area or notified route. The said provision is extracted hereunder:-

> *Restriction on grant of permits in respect of a notified area or notified route*—Where a scheme has been published under sub-section (3) of section 100 in respect of any notified area or notified route, the State Transport Authority or the Regional Transport Authority, as the case may be, *shall not grant any permit* except in accordance with the provisions of the scheme:
>
> Provided that where no application for a permit has been made by the State Transport Undertaking in respect of any notified area nor notified route in pursuance of an approved scheme, the State Transport Authority or the Regional Transport Authority, as the case may be, may grant temporary permits to any person in respect of such notified area, or notified route subject to the condition that such permit shall cease to be effective on the issue of a permit to the State transport undertaking in respect of that area or route.

25. The above mentioned provision states where a scheme has been published under Sub-section 3 of Section 100 in respect of any notified area or notified route, STA or the RTA as the case may be shall not grant any permit except in accordance with the provisions of the Scheme. An exception has been carved out in the proviso to Section 104 stating, where no application for permit has been made by the STU in respect of any notified area or notified route in pursuance of an approved scheme, the STA or the RTA, as the case may be, may grant temporary permits to any person in respect of any such notified area or notified route subject to the condition that such permit shall cease to be effective on the issue of permit to the STU in respect of that area or route. In our view same is the situation in respect of a case where an STU inspite of grant of permit does not operate the service or surrenders the permit granted or not utilizing the permit. In such a situation it should be deemed that no application for permit has been made by the STU and it is open to the RTA to grant temporary permit if there is a temporary need. By granting regular permits to the private operators RTA will be upsetting the ratio fixed under the scheme which is legally impermissible. In *Anwar Ahmad* (supra) this Court had occasion to examine the scope of the proviso to Section 104 and held as follows:-

> "it would, therefore, be seen that where the scheme has been published under sub-section (3) of Section 100 in respect of any notified area or notified route, the State Transport Authority or the Regional Transport Authority, as the case may be, shall not grant any permit except in accordance with the provisions of the scheme. Thus, the appellant-Corporation has the exclusive right or monopoly to ply their stage carriages and obtain the required permit as per the scheme. The proviso gives only a limited breath of life, namely, until the Corporation puts the vehicles on the notified routes as per the scheme, temporary permits may be granted to private operators. Thereby, it would be

clear that temporary inconvenience to traveling public is sought to be averted till the permits are taken and vehicles are put on the route by the appellant. Therefore, the temporary permits will have only limited breath of life. Private operators are attempting to wear the mask of inconvenience of traveling public to infiltrate into forbidden notified area, route or portion thereof to sabotage the scheme….."

26. We may point out if the public is put to hardship or inconvenience due to failure on the part of the STUs to operate services inspite of grant of permits for a considerable long time, it is always open to the State Government to modify the scheme and make appropriate changes in the ratio fixed on the basis of passenger road transport needs as assessed by the State Transport Commissioner but such a power is not conferred on the RTA and till that is done no private operator can operate his service on any part or portion of a notified area or notified route upsetting the ratio prescribed in the scheme except on a temporary permit granted under the proviso to Section 104 of the Act. Reference can be made to the judgments of this court in *UPSRTC and Another* vs. *Sanjidha Banu and Ors*. (2005) 10 SCC 280; *M. Madan Mohan Rao & Ors. Vs. UOI & Ors*. (2002) 6 SCC 348; *U.P. SRTC vs. Omaditya Verma* (2005) 4 SCC 424 for understanding the general purport of such Schemes and the provisions of the Act.

27. Article 226 of the Constitution of India confers extra ordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of fundamental rights or any other purpose, the powers are of course wide and expansive but not to be exercised as an appellate Authority re-appreciating the finding of facts recorded by a Tribunal or an authority exercising quasi judicial functions. Power is highly discretionary and supervisory in nature. Grant of stage carriage permits is primarily a statutory function to be discharged by the RTA exercising powers under Section 72 of the Act and not by the

High Court exercising the Constitutional powers under Article 226 or 227 of the Constitution of India. A writ Court seldom interferes with the orders passed by such authorities exercising quasi-judicial functions, unless there is serious procedural illegality or irregularity or they have acted in excess of their jurisdiction. If there is any dispute on the proper implementation of the ratio or inclusion or exclusion of any route or area in the Scheme, the RTA can always examine the same, if it is moved. The direction given by the High Court to the RTA to grant regular permits to the private operators, is therefore, patently illegal.

28. We therefore, allow all these Civil Appeals as follows:-

(i) The judgments of the High Court in C.W.P. No.8483/ 2005 and in C.W.P. No.11768 of 2005 are set aside;

(ii) The order dated 21.08.2000, passed by the Commissioner affirmed by the order dated 27.4.2005 of the State Transport Appellate Tribunal is upheld;

(iii) The common judgment of the High Court dated 1.5.2007 in C.W.P. No.11916 of 2006 and connected cases and also the orders dated 28.10.2005, 17.12.2004, 25.8.2005, 3.10.2005 and 1.8.2005 passed by the Commissioner directing grant of regular permits to the private operators are set aside.

(iv) This judgment would not stand in the way of RTAs in granting temporary permits if there is temporary need in the notified routes included in the 1990 scheme as amended in the year 1997.

D.G. Appeals disposed of.

KILLICK NIXON LTD.
v.
THE CUSTODIAN AND ORS.
(Civil Appeal No. 2724 of 2006)

APRIL 27, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 – ss. 3 and 10 – Appeal against interlocutory order of Special Court – Maintainability of – Fraudulent securities transactions – Siphoning of huge funds of various banks – Special Court passed decrees against appellant and its group Companies – Realization of amounts under the decrees – Sale of properties in the process – Plea of appellant that the appropriation of sale proceeds ought to have been carried out individually against each of the decrees and not as done by Custodian treating all the decrees as a consolidated decree – Plea negated by Special Court – On appeal, held: The order passed by Special Court was purely interlocutory and did not amount to deciding any lis as such between the parties – Since appeals against interlocutory orders are specially excluded u/s.10, interference with the impugned order is unwarranted – Even on merits, interference not warranted, since the Special Court meticulously analyzed the facts, arrived at a proper conclusion and rightly treated the decrees as a consolidated one.

'D' advanced interest free loans to appellant and its group companies. The Special Court constituted under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 found that 'D', its Directors and their close associates indulged in fraudulent securities transactions resulting in siphoning

of huge funds of various banks. 'D' was accordingly notified under the provisions of the Act.

The Custodian, on behalf of 'D', proceeded against the appellant and its group Companies for recovery of loans. Appellant and its group Companies filed applications before the Special Court for ascertaining their individual liabilities. The Special Court passed decrees against the appellant and its group Companies.

'D', in the meanwhile, filed application before the Special Judge praying that the amounts recovered from the group Companies could not be attached towards the debt payable by 'D' to the Custodian, since there was no nexus between loans advanced to original judgment-debtors and the transactions with the banks. The Special Court dismissed the prayer so made.

Properties were sold in the process of realizing the decretal amounts. Sale proceeds were appropriated against dues of the entire group of appellant.

The appellants submitted before the Special Court that the sale proceeds of the properties of their group companies ought to be apportioned individually decree wise and that the Custodian cannot be permitted to appropriate the amounts paid by the judgment debtors as also the sale proceeds realized from the sale of properties towards a consolidated decree. The Special Court held that the appellant and its group companies were all controlled by 'D' the notified party and the amounts that were being recovered in execution of the decrees were really public finds which were siphoned off by the Directors of 'D', and parked in the companies controlled by them. The Special Court accordingly held that the appropriation of sale proceeds made by the Custodian was proper and accordingly permitted the Custodian to further proceed to recover the remaining

balance. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. An interference with the impugned order passed by the Special Court, which is purely interlocutory and does not decide any rights of any party, is unwarranted. The Special Court did not decide any rights of the parties but merely passed orders from time to time including the one under the appeals for the realization of the amounts under the decrees passed which attained their finality. The procedure adopted for realization of the amounts under the decrees and the manner of appropriation by itself does not amount to deciding any *lis* as such between the parties. Under s.10 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992, an appeal shall lie to this Court from any judgment, sentence or order of the Special Court but not against the interlocutory orders. Appeals against interlocutory orders are specially excluded under the said provision. The impugned orders are purely interlocutory in nature against which no appeal lies to this Court under s.10 of the Act. [Paras 13, 15] [282-F-H; 283-A, C-D]

1.2. There cannot be any iota of doubt that appellant and other companies were always treated as one group and there is a clear finding in this regard by the Special Court that the said group of companies are nothing but front companies of M/s 'D', the notified party. Even on merits, the Special Court meticulously analyzed the facts, arrived at a proper conclusion and rightly treated the decrees as a consolidated one. [Paras 14, 15] [283-B-D]

CIFCO Properties (P) Ltd. and Others v. Custodian and Others **(2005) 3 SCC 708, relied on**

Case Law Reference:

(2005) 3 SCC 708 relied on Para 15

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2724 of 2006.

From the Judgment & Order dated 2.05.2006 of the Special Bombay in Execution Application No. 98-105 of 2001 in Misc. Petition No. 189 of 1995.

WITH

C.A. No. 4802-4803, 4806-4818 of 2008.

Dhruv Mehta, Alok K. Agarwal, Sangita, Naveen Chawla and T. Mahipal, Subramonium Prasad, Rana Mukherjee, Siddharth Gautam and Goodwill Indeever for the appearing parties.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. These appeals are directed against the orders of interlocutory nature passed by the Special Court constituted under the provisions of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as 'the Act'). They are being disposed of by this common order since the question that arises for our consideration is one and the same.

2. M/s. Dhanraj Mills Private Limited in its ordinary course of business had advanced interest free loans to the appellant M/s. Killick Nixon Limited and its group of companies. In the year 1992, the Special Court found that M/s. Dhanraj Mills Private Limited, its Directors and their close associates indulged in fraudulent securities transactions resulting in siphoning of huge funds of various banks. The banks had gone into liquidation as a result of those fraudulent securities transactions. The Special Court also held that the end

beneficiaries of the siphoned funds were the Directors of M/s. Dhanraj Mills Private Limited and Director of Bank of Karad which bank was used as a conduit for the fraudulent transactions.

3. M/s. Dhanraj Mills Private Limited was accordingly notified under the provisions of the said Act. On and from the date of notification, the properties, movable or immovable, or both belonging to any person notified under sub-section (2) of Section 3 of the said Act shall stand attached, simultaneously with the issue of the notification. Be it noted that M/s. Dhanraj Mills Private Limited itself owned 33% of M/s. Killick Nixon Limited and the person in ultimate control, ownership and management of M/s. Killick Nixon Limited is one T.B. Ruia (who at all relevant points of time was Managing Director of M/s. Dhanraj Mills Private Limited) who was also notified under the Act.

4. The Custodian, on behalf of M/s Dhanraj Mills Private Limited, proceeded against the appellant M/s. Killick Nixon Ltd. and its group Companies for recovery of loans totaling Rs.20,81,67,031/-. The amounts due to M/s. Dhanraj Mills Private Limited also stood attached with the issue of notification.

5. In the year 1995, the appellant M/s. Killick Nixon Limited and its group Companies filed separate applications before Special Court for ascertaining their individual liabilities with a request to grant time for recompense. Simultaneously, the Custodian also filed applications for fixation of liability and demanding interest @ 24% per annum. In the year 1997, the Special Court passed decrees against the appellant and its group Companies which are consent decrees *qua invitum* the Custodian, whereby individually ascertained amounts were to be paid in installments with the interest @ 15% per annum. Similar consent decree was passed against 13th group Company also.

6. M/s Dhanraj Mills Private Limited, in the meanwhile, made an application before the Special Judge contending that the amounts recovered from the group Companies cannot be attached towards the debt payable by M/s Dhanraj Mills Private Limited to the Custodian, since there was no nexus between loans advanced to original judgment-debtors and the transactions with the banks. The prayer in the said application was that the amount so recovered was to be freed from attachment until to be paid back to M/s Dhanraj Mills Private Limited, by the Custodian. The Special Court dismissed the claim so made on the ground that the Directors of M/s Dhanraj Mills Private Limited and its close associates were involved in fraudulent deals and have siphoned off funds belonging to banks. The Special Court found overwhelming evidence that M/s Dhanraj Mills Private Limited is liable to make payment and all its assets fall within the purview of the Act. It is in this order the Special Court specifically held that this is a fit case "for the corporate veil to be torn off" as M/s Dhanraj Mills Private Limited had no explanation whatsoever for how such large amounts of "loans" could have been advanced to the appellant and its group Companies when M/s Dhanraj Mills Private Limited itself had been defunct for many years without any commercial activity of its own.

7. In the year 1999, The Special Court having considered the request of the original judgment debtors, granted extension of time and directed the Custodian not to proceed with execution of the decrees, subject to payment of defaulted installments. As usually, the appellant and its group Companies defaulted in payment of the said amounts once again. Left with no alternative, the Custodian filed execution applications against the judgment debtors for recovery of dues from M/s Dhanraj Mills Private Limited. It is not necessary to refer the facts, the subsequent events in detail and various objections raised from time to time as to the sale of properties in the process of realizing the decretal amounts. However, one important fact that may be required to state is that the Special

Court by its earlier order dated 30th November, 2001 required the judgment debtors to pay Rs.16 crores payable towards all decrees for considering the prayer for extension of time to which all of them agreed to do so. This singular fact establishes that even judgment debtors were treating the separate decrees passed against each one of them as a consolidated common decree. The Custodian, at all points of time treated them as a group to which no objections were raised at any point of time. The sale proceeds were accordingly appropriated against dues of the entire group of M/s Killick Nixon Ltd.

8. The dispute now raised by the appellants is that the sale proceeds or the properties of M/s. Killick Nixon group companies ought to be apportioned individually decree wise. This is contrary to its earlier stand. The material available on record also reveals that these group companies have always referred to the aggregate principal amount of alleged loan given by M/s. Dhanraj Mills Private Limited.

9. The appellants submitted before the Special Court that the liabilities of the judgment debtors under separate decrees were not joint liabilities inasmuch as each judgment debtor is a separate entity in law having their separate properties and assets. It was the case of the appellants that merely because the judgment debtors are group companies the amount of decree passed against them cannot be consolidated. It was their case that the Custodian cannot be permitted to appropriate the amounts paid by the judgment debtors as also the sale proceeds realized from the sale of properties towards a consolidated decree. It is not necessary to refer in detail the stand taken by the Custodian opposing the plea of the appellants. Various instances were pointed out by the Custodian as to how the appellants themselves were treating the decrees as a consolidated one.

10. It was specifically demonstrated by the Custodian that the appellants not only treated them as one group but have themselves proceeded and agreed to have appropriation of the

sale proceeds of the properties sold on group basis. The averment in the petition filed in the Special Court contained figures relating to the aggregate dues of the group, the aggregate amounts received from the sale of properties and the aggregate balance amount.

11. The Special Court after a detailed consideration came to the conclusion that M/s. Killick Nixon Limited and others are group companies and they are all controlled by M/s. Dhanraj Mills Private Limited – notified party and the amounts that are being recovered in execution of the decrees are really public funds which were siphoned off by the Directors of M/s Dhanraj Mills Private Limited, and parked in the companies controlled by them. The Special Court accordingly held that the appropriation of sale proceeds made by the Custodian is proper and accordingly the Custodian should proceed further to recover the amount that remained in balance.

12. In these appeals, the singular submission made by Shri Dhruv Mehta, learned senior counsel for the appellants, is that the appropriation of sale proceeds ought to have been carried out individually against each of the decree and not as done by the Custodian treating all the decrees as a consolidated decree.

13. Having heard learned counsel for the appellants and respondent, we are satisfied that an interference with the impugned order passed by the Special Court, which is purely interlocutory and does not decide any rights of any party, is unwarranted. The Special Court did not decide any rights of the parties but merely passed orders from time to time including the one under the appeals for the realization of the amounts under the decrees passed which attained their finality. The procedure adopted for realization of the amounts under the decrees and the manner of appropriation, in our considered opinion, by itself does not amount to deciding any *lis* as such between the parties. Under Section 10 of the Act that an appeal shall lie to this Court from any judgment, sentence or order of

the Special Court but not against the interlocutory orders. Appeals against interlocutory orders are specially excluded under the said provision.

14. There cannot be any iota of doubt that M/s Killick Nixon and other companies were always treated as one group and there is a clear finding in this regard by the Special Court that the said group of companies are nothing but front companies of M/s. Dhanraj Mills Private Limited.

15. The orders impugned in these appeals are purely interlocutory in nature against which no appeal lies to this court under Section 10 of the Act. We are fortified in that view of ours by a decision of this court in *CIFCO Properties (P) Ltd. and Others vs. Custodian and Others*[1]. Even on merits, we find that the Special Court having meticulously analyzed the facts, arrived at a proper conclusion and rightly treated the decrees as a consolidated one.

16. We find no merit in these appeals and they are accordingly dismissed without any order as to costs.

B.B.B Appeals dismissed.

1. (2005) 3 SCC 708.

INDOWIND ENERGY LTD.
v.
WESCARE (I) LTD. AND ANR.
(Civil Appeal No. 3874 of 2010)

APRIL 27, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Arbitration and Conciliation Act, 1996 – ss.7 and 11 – Agreement of sale between respondent nos.1 and 2 described respondent no.1 as the seller, and respondent no.2 as the buyer and the promoters of appellant – Agreement contained an arbitration clause – Disputes between respondent no.1 on one hand and respondent no.2 and appellant on the other, in respect of the said agreement – Respondent no.1 filed petition u/s.11(6) against respondent no.2 and appellant for appointment of sole arbitrator to arbitrate upon disputes between them in respect of the said agreement – Dispute as to whether appellant was prima facie a party to the arbitration agreement contained in the agreement of sale and was bound by it, even though it was not a signatory to the agreement of sale – Held: Merely because respondent no.2 described appellant as its nominee or as a company promoted by it or that the agreement was purportedly entered by respondent no.2 on behalf of appellant, did not make appellant a party to the agreement in the absence of a ratification, approval, adoption or confirmation of the same by appellant – Consequently, appellant cannot be deemed to be a party to the arbitration agreement contained in the said agreement – In absence of arbitration agreement between respondent no.1 and appellant, no claim against appellant or no dispute with appellant could be subject-matter of reference to an arbitrator – Order of High Court appointing arbitrator in regard to claims of respondent no.1 against appellant accordingly set aside.

Arbitration and Conciliation Act, 1996 – ss.2(1)(b) and 7 – Arbitration agreement – Held: A provision for arbitration to constitute an arbitration agreement for the purpose of s.7 should satisfy two conditions : (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute.

The appellant and respondent nos.1 and 2 are companies incorporated under the Companies Act, 1956. Respondent no.1 is in the business of setting up and operating/managing wind farms and generation of power from Wind Electric Generators (WEGs). Respondent no.2 is a promoter of appellant.

On 24.2.2006 an agreement of sale was entered into between respondent nos.1 and 2. The agreement described respondent no.1 as the seller, and respondent no.2 as the buyer and the promoters of appellant. The said agreement contained an arbitration clause. The Board of Directors of respondent no.1 at its meeting accorded approval to the agreement dated 24.2.2006. The Board of Directors of respondent no.2 also approved the said agreement. There was however no such approval by the Board of Directors of the appellant.

Certain disputes allegedly arose between respondent no.1 on the one hand and respondent no.2 and appellant on the other, in respect of the said agreement dated 24.2.2006. Respondent no.1 filed three petitions under section 9 of the Arbitration and Conciliation Act, 1996 against respondent no.2 and appellant seeking various interim measures. The petitions were dismissed by the High Court.

Thereafter, respondent no.1 filed a petition under section 11(6) of the Act against respondent no.2 and appellant for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of agreement

dated 24.2.2006. Respondent no.2 resisted the said petition alleging that there was no cause of action nor any arbitrable dispute between them. Appellant on the other hand resisted the petition *inter alia* on grounds that it was not a party to the agreement dated 24.2.2006 entered into between respondent nos. 1 and 2; that it had not ratified the agreement dated 24.2.2006 or acted upon it and that there was no arbitration agreement between respondent no.1 and appellant.

The Chief Justice of the High Court allowed the said application under section 11 and appointed a sole arbitrator holding that appellant was *prima facie* a party to the arbitration agreement and was bound by it, even though it was not a signatory to the agreement dated 24.2.2006.

In appeal to this Court, the following two questions arose for consideration: 1) whether appellant-company could be said to be a party to the agreement dated 24-2-2006, even though it did not sign the agreement, and 2) whether the arbitration clause found in the agreement dated 24-2-2006 between respondent nos. 1 and 2, could be considered as a binding arbitration agreement on the appellant.

Allowing the appeal, the Court

HELD: 1. The order of the High Court appointing an Arbitrator in regard to the claims of respondent no.1 against the appellant is set aside and the application under section 11(6) of the Arbitration and Conciliation Act, 1996 filed by respondent no.1 insofar as appellant is concerned is dismissed. The appointment of Arbitrator insofar as respondent no.2 is concerned, is not disturbed. [Para 25] [308-C-D]

2. The term arbitration agreement is defined under section 2(1)(b) of the Arbitration and Conciliation Act,

1996 as an agreement referred to in section 7. An analysis of sub-sections (2), (3) and (4) of section 7 shows that an arbitration agreement will be considered to be in writing if it is contained in: (a) a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of section 7 should satisfy two conditions : (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute. [Paras 10, 11] [299-D-H; 300-A]

'Yogi Agrawal v. Inspiration Clothes & U & Ors. **2009 (1) SCC 372, relied on.**

3.1. In the present case, respondent no.1 has not entered into any agreement with appellant, referring to the agreement dated 24.2.2006 containing the arbitration agreement, with the intention of making such arbitration agreement, a part of their agreement. Nor is it the case of respondent no.1 that there has been any exchange of statements of claim and defence in which it had alleged the existence of an arbitration agreement and the same had been accepted and not denied by appellant in the defence statement. It is also not the case of respondent no.1 that any exchange of letters, telex, telegrams or other means of telecommunication referred to and provided a record of any arbitration agreement between the parties. It therefore follows that neither sub-section (5) nor

clauses (b) and (c) of sub-section (4) of section 7 applies. [Para 12] [300-B-D]

3.2. There can be appointment of an arbitrator if there was any dispute between respondent nos. 1 and 2. However, in the absence of any document signed by the parties as contemplated under clause (a) of sub-section (4) of section 7, and in the absence of existence of an arbitration agreement as contemplated in clauses (b) or (c) of sub-section (4) of section 7 and in the absence of a contract which incorporates the arbitration agreement by reference as contemplated under sub-section (5) of section 7, the inescapable conclusion is that appellant is not a party to the arbitration agreement. In the absence of an arbitration agreement between respondent no.1 and appellant, no claim against appellant or no dispute with appellant can be the subject-matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of section 7 of the Act. [Para 13] [300-E-H; 301-A-B]

4. Respondent no.2 and appellant are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of respondent no.2 was also a Director of appellant and if the intention of the parties was that appellant should be bound by the agreement, nothing prevented respondent no.1 insisting that appellant should be made a party to the agreement and requesting the Director who signed for respondent no.2 also to sign on behalf of appellant. The very fact that parties carefully

avoided making appellant a party and the fact that the Director of respondent no.2 though a Director of appellant, was careful not to sign the agreement as on behalf of appellant, shows that the parties did not intend that appellant should be a party to the agreement. Therefore the mere fact that respondent no.2 described appellant as its nominee or as a company promoted by it or that the agreement was purportedly entered by respondent no.2 on behalf of appellant, will not make appellant a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24.2.2006 by appellant. [Para 15] [301-F-H; 302-A-C]

5. Also, a specific clause of the agreement dated 24.2.2006 categorically states that the agreement shall be null and void and of no effect whatsoever unless it is expressly approved by the respective Board of Directors/ shareholders of respondent no.1, respondent no.2 and appellant. In the present case, the Board of Directors of respondent no.1 and respondent no.2 approved the agreement. But the Board of Directors or the shareholders of appellant did not approve the agreement. In the absence of such approval by appellant, and in the absence of appellant being a party or signatory to the agreement dated 24.2.2006, it is not understandable as to how appellant can be deemed to be a party to the agreement dated 24.2.2006 and consequently a party to the arbitration agreement contained therein. [Para 16] [302-D-E]

6. An arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under section 7. If section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under section 11 to show that there

existed an oral contract between the parties, or that appellant had transacted with respondent no.1, or respondent no.1 had performed certain acts with reference to Appellant, as proof of arbitration agreement. [Para 17] [303-B-C]

7.1. The scope of examination of the agreement dated 24.2.2006, by the Chief Justice or his Designate under section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. The Chief Justice exercising jurisdiction under section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application under section 11 of the Act. Any wider examination in such a summary proceeding will not be warranted. [Para 19] [304-C-F]

7.2. Insofar as the issue of existence of arbitration agreement between the parties, the Chief Justice or his Designate is required to decide the issue finally and it is not permissible in a proceeding under section 11 to merely hold that a party is *prima facie* a party to the arbitration agreement and that a party is *prima facie* bound by it. It is not as if the Chief Justice or his Designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his Designate under section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. Therefore the *prima facie* finding by the Chief Justice that appellant

is a party to the arbitration agreement is not what is contemplated by the Act. [Para 20] [304-F-H; 305-A-C]

Economic Transport Organisation v. M/s. Charan Spinning Mills (P) Ltd. **2010 (2) SCALE 427 and** *SBP & Co. v. Patel Engineering Limited* **2005 (8) SCC 618, followed.**

National Insurance Co. Ltd. v. Boghara Polyfab Pvt. ***Ltd*****. 2009 (1) SCC 267, relied on.**

8. No doubt if appellant had acknowledged or confirmed in any correspondence or other agreement or document, that it is a party to the arbitration agreement dated 24.2.2006 or that it is bound by the arbitration agreement contained therein, it could have been possible to say that appellant is a party to the arbitration agreement. But that would not be under section 7(4)(a) but under section 7(4)(b) or section 7(5). Be that as it may. That is not the case of respondent no.1. In fact, the delivery notes/invoices issued by respondent no.1 do not refer to the agreement dated 24.2.2006. Nor does any letter or correspondence sent by appellant refers to the agreement dated 24.2.2006, either as an agreement executed by it or as an agreement binding on it. [Para 21] [305-C-E]

9.1. The letter dated 15.3.2006 enclosing the invoice, the delivery notes dated 15.3.2006 given by respondent no.1 to appellant, the confirmation dated 15.3.2006 by respondent no.1 to appellant relating to the sale of WEGs, relied on by respondent no.1, very significantly do not refer to the agreement dated 24.2.2006. They are straight and simple delivery notes and an invoice in regard to the sale of goods. They can be independent transactions which do not depend on or relate to the agreement dated 24.2.2006. If they were with reference to the agreement dated 24.2.2006, it is strange that respondent no.1 did not choose to refer to the said agreement in any of these

documents. [Para 22] [305-F-H; 306-A]

9.2. The Red Herring Prospectus issued by the appellant in connection with the public issue of its shares merely refers to appellant agreeing to take over the wind mills along with land, infrastructure and spares from respondent no.1. It does not refer to the agreement dated 24.2.2006 nor does it state that the takeover of the wind mills etc., was in pursuance of the agreement dated 24.2.2006. The Prospectus specifically states that respondent no.2 had entered into an agreement dated 24.2.2006 with respondent no.1 to acquire WEGs and other assets in the name of its nominee Appellant. This has never been disputed by anyone. But what is significant is that there is no acknowledgement or statement that the said agreement was authorized to be entered on its behalf by appellant or appellant had ratified or approved the said agreement. The prospectus also refers to the applications under section 9 filed by respondent no.1 and the interlocutory applications filed in such applications. But then that also does not help as in fact in the said application under section 9 the High Court had held that appellant is not a party to the agreement dated 24.2.2006 and therefore not a party to an arbitration agreement. [Para 23] [306-B-D; 307-F-G]

FISSER v. International Bank **282 F.2d 231 (1960);** *J.J. Ryan & Sons, Inc. v. Rhone Poulene Textile S.A.* **863 F.2d 315, referred to.**

Case Law Reference:

2009 (1) SCC 372	**relied on**	**Para 11**
2010 (2) SCALE 427	**followed**	**Para 18**
2005 (8) SCC 618	**followed**	**Para 19**
2009 (1) SCC 267	**relied on**	**Para 19**

282 F.2d 231 (1960	**referred to**	**Para 24**
863 F.2d 315	**referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3874 of 2010.

From the Judgment & Order dated 1.8.2008 of the High Court of Madras in O.P. No. 748 of 2007.

K.V. Vishwanathan, T.R.B. Sivakumar and K.V. Vijayakumar for the Appellant.

C.A. Sundaram, P.C. Sen, Rohini Musa, A.J. Jawad, S.K. Srinivasan, Zafar Inayat, Abhishek Guptas, Aanchal Yadav, Anadh Kannan, Binu Tamta, Satish C.S.K., Garvesh Kabra, Haripriya and Pooja Kabra for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted.

2. The appellant and respondents 1 and 2 are companies incorporated under the Companies Act, 1956. Wescare Care (I) Ltd., the first respondent (for short 'Wescare'), is in the business of setting up and operating/managing windfarms and generation of power from Wind Electric Generators. Subuthi Finance Ltd - second respondent ('Subuthi' for short) is a promoter of the appellant company – Indowind Energy Ltd., (referred to as 'Indowind'). On 24.2.2006 an agreement of sale was entered into between Wescare and Subuthi. The agreement described "Wescare (India) Ltd. including its subsidiary RCI Power Ltd" as the "seller/Wescare". It described Subuthi Finance Ltd. and its nominee as "buyer" and as the "promoters of Indowind Energy Ltd." Under the said agreement, the seller agreed to transfer to the buyer certain business assets of the seller for a consideration of Rs.98.19 crores, of which Rs.24.19 crores was payable in cash and Rs.74 crores by issue of 74 lakhs shares (of the face value of Rs.10/- at a premium of Rs.90/- per share). Clause 10 of the agreement

relates to arbitration. Clause 11 of the agreement relates to approval. The said clauses are extracted below :

"10. Governing Law and Jurisdiction.

This AGREEMENT shall be governed by and interpreted in accordance with the laws of India. The Parties submit to the exclusive jurisdiction of the court in the city of Chennai, Tamil Nadu. Any dispute, difference, claims or questions arising under this agreement or concerning any matter covered by this Agreement or touching upon this Agreement, the same shall be referred to arbitration before a sole arbitrator to be appointed by consent of Seller, Buyer/IW. The decision/award of the Sole Arbitrator shall be final and binding on all parties. The provisions of the Arbitration and Conciliation Act, 1996, with such amendments thereto as may be applicable, shall apply to the proceedings. The venue of the arbitration shall be Chennai and the language of the Arbitration shall be English."

"11. Approval.

Notwithstanding anything to the contrary herein contained in this AGREEMENT this agreement is expressly subject to the approval of the respective Boards of Directors/ Shareholders by the Seller, the Buyer and Indowind Energy Limited and if such approval is not obtained either by the Seller, the Buyer or IW on or before 30th June 2006 this AGREEMENT shall be null and void and of no effect whatsoever and all transactions done under the agreement shall be reversed with all the costs and damages to the defaulting party."

3. The Board of Directors of Wescare at its meeting held on 28.2.2006 accorded approval to the agreement dated 24.2.2006. The Board of Directors of Subuthi at its meeting held on 1.3.2006 approved the said agreement. There was however

no such approval by the Board of Directors of Indowind.

4. According to Indowind, Wescare sold 31 Wind Electric Generators (WEGs) to Indowind on 15.3.2006 for a consideration of Rs.13,48,00,700/-, out of which Rs.4.5 crores was paid in cash and Rs.8.84 crores by allotment of 884,000 shares of Indowind to Wescare. Further, towards the purchase of another 8 WEGs from Wescare, Indowind allotted 58,000 shares.

5. According to Wescare, certain disputes arose between Wescare on the one hand and Subuthi and Indowind on the other, in respect of the said agreement. Wescare filed three petitions under section 9 of the Arbitration and Conciliation Act, 1996 ('the Act', for short) against Subuthi and Indowind seeking the following interim measures :

(i) OA No.641/2007 to restrain Subuthi and Indowind from alienating, encumbering or otherwise disposing of the 31 WEGs and the land appurtenant thereto.

(ii) OA NO.642/2007 to restrain Subuthi and Indowind from operating or running the WEGs pending completion of arbitration proceedings.

(iii) OA No. 975/2007 to restrain Indowind from proceeding with the issue of initial public offer, proposed under the Red Herring Prospectus issued by it, pending final disposal of the arbitration proceedings.

6. The said applications were dismissed by a learned Single Judge of the Madras High Curt on 21.8.2007, holding as follows :

(a) As Indowind has not signed nor ratified the agreement dated 24.2.2006, the maintainability of the applications under section 9 of the Act was doubtful.

(b) As the WEGs were purchased by Indowind after paying the entire sale consideration, Wescare was not entitled to an injunction restraining Indowind from alienating the WEGs.

The order however clarified that whatever had been stated therein was in the context of disposal of the applications seeking interim measures under section 9 of the Act and nothing contained therein should be construed as findings on merits and the Arbitrator should determine the issues raised before him uninfluenced by the observations made in the said order.

7. Wescare filed a petition under section 11(6) of the Act against Subuthi and Indowind for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of agreement dated 24.2.2006. Subuthi resisted the said petition alleging that as the agreement dated 24.2.2006 did not contemplate any transaction between Wescare and itself (Subuthi) and as no transaction took place between Wescare and Subuthi under the agreement dated 24.2.2006, there was no cause of action nor any arbitrable dispute between them. Indowind resisted the petition on the ground that it was not a party to the agreement dated 24.2.2006 entered into between Wescare and Subuthi; that it had not ratified the agreement dated 24.2.2006 or acted upon it; that there was no arbitration agreement between Wescare and Indowind; that the transactions of purchase of 31 WEGs were neither covered by nor in pursuance of the agreement dated 24.2.2006 and therefore the petition was liable to be dismissed.

8. The learned Chief Justice of the Madras High Court allowed the said application under section 11 of the Act, by the impugned order dated 1.8.2008 and appointed a sole arbitrator. The learned Chief Justice held that Indowind was *prima facie* a party to the arbitration agreement and was bound by it, even though it was not a signatory to the agreement dated

24.2.2006. His conclusion was based on the following findings:

(a) Execution of the agreement dated 24.2.2006 between Wescare and Subuthi containing the arbitration agreement, was not in dispute.

(b) Subuthi is one of the promoters of Indowind. Both of them had a common registered office and common Directors. The correspondence emanating from Indowind was signed by Raja Sukumar who was the signatory on behalf of Subuthi in the agreement dated 24.2.2006. By lifting the corporate veil, it could be seen that Subuthi and Indowind was one and the same party.

(c) The agreement dated 24.2.2006 described Subuthi as the promoter of Indowind and also described Indowind as the nominee of Subuthi. Subuthi had entered into an agreement for purchase of the business assets of Wescare for its nominee Indowind. The signatory to the agreement on behalf of Subuthi was also a Director of Indowind.

(d) The agreement dated 24.2.2006 contemplated Indowind purchasing the assets of Wescare including the WEGs. and making payment therefor, both in cash and by allotment of shares. Indowind had in fact purchased from Wescare 39 WEGs. in March, 2006, the consideration for which was paid partly in cash and partly by allotment of shares, thereby indicating that Indowind acted in terms of the agreement dated 24.2.2006.

(e) The Red Herring Prospectus issued by Indowind in connection with the public issue of equity shares gives a clear indication that it is bound by the agreement dated 24.2.2006 between Wescare and Subuthi (vide Risk Factor Nos.30 and 31).

(f) Signature of a party is not a formal requirement of an arbitration agreement either under sub-section (4)(b) and (c) or under sub-section (5) of section 7 of the Act. Therefore, Indowind could be held to be a party to the agreement dated 24.2.2006, even if it had not executed the said agreement.

9 The said judgment is challenged in this appeal by special leave. On the contentions urged the following two questions arise for consideration:

(i) Whether an arbitration clause found in a document (agreement) between two parties, could be considered as a binding arbitration agreement on a person who is not a signatory to the agreement?

(ii) Whether a company could be said to be a party to a contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct?

10. Section 7 defines an arbitration agreement and it is extracted below :

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties'

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other,

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

The term 'party' is defined in section 2(1)(h) as referring to a party to an arbitration agreement. The term arbitration agreement is defined under section 2(1)(b) as an agreement referred to in section 7. An analysis of sub-sections (2), (3) and (4) of section 7 shows that an arbitration agreement will be considered to be in writing if it is contained in : (a) a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract.

11. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of section 7 should satisfy two conditions : (i) it should be between the

parties to the dispute; and (ii) it should relate to or be applicable to the dispute. [See: *Yogi Agrawal v. Inspiration Clothes & U & Ors*. - 2009 (1) SCC 372].

12. Wescare has not entered into any agreement with Indowind, referring to the agreement dated 24.2.2006 containing the arbitration agreement, with the intention of making such arbitration agreement, a part of the their agreement. Nor is it the case of Wescare that there has been any exchange of statements of claim and defence in which it had alleged the existence of an arbitration agreement and the same had been accepted and not denied by Indowind in the defence statement. It is also not the case of Wescare that any exchange of letters, telex, telegrams or other means of telecommunication referred to and provided a record of any arbitration agreement between the parties. It therefore follows that neither sub-section (5) nor clauses (b) and (c) of sub-section (4) of section 7 applies. Therefore, what remains to be seen is whether there is any 'document signed by parties', as provided in clause (a) of sub-section (4) of section 7.

13. Wescare puts forth the agreement dated 24.2.2006 as an agreement signed by the parties containing an arbitration agreement but the said agreement is signed by Wescare and Subuthi and not by Indowind. It is not in dispute that there can be appointment of an arbitrator if there was any dispute between Wescare and Subuthi. The question is when Indowind is not a signatory to the agreement dated 24.2.2006, whether it can be considered to be a 'party' to the arbitration agreement. In the absence of any document signed by the parties as contemplated under clause (a) of sub-section (4) of section 7, and in the absence of existence of an arbitration agreement as contemplated in clauses (b) or (c) of sub-section (4) of section 7 and in the absence of a contract which incorporates the arbitration agreement by reference as contemplated under sub-section (5) of section 7, the inescapable conclusion is that

Indowind is not a party to the arbitration agreement. In the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject-matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of section 7 of the Act.

14. Learned counsel for Wescare referred to various clauses in the agreement dated 24.2.2006 to contend that it should be deemed to be an agreement executed/signed by Indowind. Firstly it was submitted that the agreement was entered into by Subuthi as promoter of Indowind and also described Indowind as its nominee and the agreement was signed on behalf of Subuthi by a person who was also a Director of Indowind. It is submitted that the agreement also specifically stated that Subuthi was desirous of purchasing certain assets of Wescare for its nominee Indowind, and in fact, Indowind purchased the said assets of Wescare. This according to the learned counsel for Wescare, led to an irresistible conclusion that Indowind was acting in terms of the agreement dated 24.2.2006 and therefore, it would be bound by the arbitration clause therein.

15. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on

behalf of Indowind. The very fact that parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24.2.2006 by Indowind.

16. Clause 11 of the agreement dated 24.2.2006 categorically states that the agreement shall be null and void and of no effect whatsoever unless it is expressly approved by the respective Board of Directors/shareholders of Wescare, Subuthi and Indowind. It is admitted that the Board of Directors of Wescare and Subuthi approved the agreement. But the Board of Directors or the shareholders of Indowind did not approve the agreement. In the absence of such approval by Indowind, and in the absence of Indowind being a party or signatory to the agreement dated 24.2.2006, it is ununderstandable as to how Indowind can be deemed to be a party to the agreement dated 24.2.2006 and consequently a party to the arbitration agreement contained therein.

17. Wescare referred to several acts and transactions as also the conduct of Indowind to contend that an inference should be drawn that Indowind was a party to the agreement or that it had affirmed and approved the agreement or acted in terms of the agreement. An examination of the transactions between the parties to decide whether there is a valid contract or whether a particular party owed any obligation towards another party or whether any person had committed a breach of contract, will be possible in a suit or arbitration proceeding claiming damages or performance. But the issue in a proceeding under

section 11 is not whether there was any contract between the parties or any breach thereof. A contract can be entered into even orally. A contract can be spelt out from correspondence or conduct. But an arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under section 7. If section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under section 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement.

18. A Constitution Bench of this Court in *Economic Transport Organisation v. M/s. Charan Spinning Mills (P) Ltd*. – 2010 (2) SCALE 427 pointed out that court examines a document from different perspectives in different types of cases. This Court observed:

> "20. In this context, it is necessary to remember that the nature of examination of a document may differ with reference to the context in which it is examined. If a document is examined to find out whether adequate stamp duty has been paid under the Stamp Act, it will not be necessary to examine whether it is validly executed or whether it is fraudulent or forged. On the other hand, if a document is being examined in a criminal case in the context of whether an offence of forgery has been committed, the question for examination will be whether it is forged or fraudulent, and the issue of stamp duty or registration will be irrelevant. But if the document is sought to be produced and relied upon in a civil suit, in addition to the question whether it is genuine, or forged, the question whether it is compulsorily registrable or not, and the question whether it bears the proper stamp duty, will become relevant. If the document is examined in the

> context of a dispute between the parties to the document, the nature of examination will be to find out that rights and obligation of one party vis-à-vis the other party. If in a summary proceedings by a consumer against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer and his insurer."

19. The scope of examination of the agreement dated 24.2.2006, by the learned Chief Justice or his Designate under section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. This Court in *SBP & Co. v. Patel Engineering Limited* [2005 (8) SCC 618] and in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*. [2009 (1) SCC 267] has held that when an application is filed under section 11, the Chief Justice or his Designate is required to decide only two issues, that is whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction under section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application under section 11 of the Act. Any wider examination in such a summary proceeding will not be warranted.

20. In so far as the issue of existence of arbitration agreement between the parties, the learned Chief Justice or his Designate is required to decide the issue finally and it is not permissible in a proceeding under section 11 to merely hold that a party is *prima facie* a party to the arbitration agreement and that a party is *prima facie* bound by it. It is not as if the

Chief Justice or his Designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his Designate under section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. This is categorically laid down by the Constitution Bench in *SBP*. Therefore the *prima facie* finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act.

21. It is no doubt true that if Indowind had acknowledged or confirmed in any correspondence or other agreement or document, that it is a party to the arbitration agreement dated 24.2.2006 or that it is bound by the arbitration agreement contained therein, it could have been possible to say that Indowind is a party to the arbitration agreement. But that would not be under section 7(4)(a) but under section 7(4)(b) or section 7(5). Be that as it may. That is not the case of Wescare. In fact, the delivery notes/invoices issued by Wescare do not refer to the agreement dated 24.2.2006. Nor does any letter or correspondence sent by Indowind refers to the agreement dated 24.2.2006, either as an agreement executed by it or as an agreement binding on it. We may now refer to the several documents referred to and relied on by Wescare.

22. The first is in regard to the sale of WEGs by Wescare to Indowind. The letter dated 15.3.2006 enclosing the invoice, the delivery notes dated 15.3.2006 given by Wescare to Indowind, the confirmation dated 15.3.2006 by Wescare to Indowind relating to the sale of WEGs, relied on by Wescare, very significantly do not refer to the agreement dated 24.2.2006. They are straight and simple delivery notes and an invoice in regard to the sale of goods. They can be independent transactions which do not depend on or relate to the agreement dated 24.2.2006. If they were with reference to the agreement

dated 24.2.2006, it is strange that Wescare did not choose to refer to the said agreement in any of these documents.

23. Strong reliance is placed on the Red Herring Prospectus issued by the Indowind in connection with the public issue of its shares. We extract below the relied upon portions of the prospectus :

> "30. We have agreed to takeover the assets of Wescare (India) Limited, subject to approval of owners of assets and statutory formalities, but only a portion of acquisition has been completed.
>
> Our Company agreed to takeover wind mills along with land, infrastructure and spares from Wescare India Limited. But due to non receipt of approvals from the lenders/lessors, only a part of the total being 6.49 MW has been acquired by us. The Company is not certain of completing the remaining acquisition. We had paid the total amount for 39 windmills, however only 28 windmills were delivered to us representing nearly 72% of the total money paid by us.
>
> 31. One of our Promoters, Subuthi Finance Limited, has entered into an agreement dated February 24, 2006 with Wescare (India) Limited for the acquiring wind mills and other assets in the name of its nominee viz. Indowind Energy Limited for a consideration aggregating approximately Rs.9819 lacs.
>
> The consideration for the above was to be partly settled in partly in cash (Rs.2419 lacs) and partly by way of shares (74 lacs) of Indowind Energy Limited.
>
> Wescare (India) Limited has filed the following applications before the Hon'ble High Court of Madras under Section 9 of the Arbitration and Conciliation Act, 1996 :

S.No.	Application No.	Applicant	Respondents
1	O.A.No.641 of 2007	Wescare India Limited	(i) Subuthi Finance Limited (ii) Indowind Energy Limited
2	O.A.No.642 of 2007	-same as above-	-same as above
3	Appl. No.3808 of 2007	-same as above-	-same as above
4	Appl. No.3808 of 2007	-same as above-	-same as above-

All above applications are pending before the Hon'ble High Court of Madras. For further details of the same, please refer section titled "Outstanding Litigations and Material Developments" on page 190 of this Red Herring Prospectus."

Para 30 of the Prospectus merely refers to Indowind agreeing to take over the wind mills along with land, infrastructure and spares from Wescare. It does not refer to the agreement dated 24.2.2006 nor does it state that the takeover of the wind mills etc., was in pursuance of the agreement dated 24.2.2006. Para 31 of the Prospectus specifically states that Subuthi had entered into an agreement dated 24.2.2006 with Wescare to acquire WEGs and other assets in the name of its nominee Indowind. This has never been disputed by anyone. But what is significant is that there is no acknowledgement or statement that the said agreement was authorized to be entered on its behalf by Indowind or Indowind had ratified or approved the said agreement. Para 31 also refers to the applications under section 9 filed by Wescare and the interlocutory applications filed in such applications. But then that also does not help as in fact in the said application under section 9 the High Court has held that Indowind is not a party to the agreement dated 24.2.2006 and therefore not a party to an arbitration agreement.

24. Wescare relied upon two decisions of the US Court

of Appeals to contend that a person to be bound by an arbitration agreement need not personally sign the written arbitration agreement. [*FISSER v. International Bank* - 282 F.2d 231 (1960) and *J.J.Ryan & Sons, Inc. v. Rhone Poulene Textile, S.A.* - 863 F.2d 315]. These decisions are of no assistance as they do not relate to a provision similar to section 7 of the Indian Act.

25. In view of the above, we allow this appeal, set aside the order of the High Court appointing an Arbitrator in regard to the claims of Wescare against Indowind and dismiss the application under section 11(6) of the Act filed by Wescare in so far as Indowind is concerned. The appointment of Arbitrator in so far as Subuthi is concerned, is not disturbed. It is however open to Subuthi to raise all contentions including the contention relating to absence of arbitral dispute, before the Arbitrator.

B.B.B. Appeal allowed.